NO. (1)

Supreme Court, U.S.
FILED

09-635 NOV 25 2009

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In The
Supreme Court of the United States

IN RE SHINNECOCK SMOKE SHOP

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's Native American trademark application may be denied on the erroneous basis his Native American Tribe is a "Person" or "Institution" under Section 2(a) of the Trademark Act?

II. Whether the Native American Petitioner made a *prima facie* showing of illegal racial discrimination by a documented pattern of trademark registrations of similarly situated trademarks granted to non-Native American applicants?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner

Petitioner, Jonathan K. Smith, is a reservation member of the Shinnecock Indian Nation, and was the applicant of two trademark applications to the United State Patent and Trademark Office, SHINNECOCK BRAND FULL FLAVOR (Serial No. 78918061) and SHINNECOCK BRAND LIGHTS (Serial No. 78918500), which were consolidated on all appeals. Petitioner was the Appellant before the United States Patent and Trademark Office, Trial and Appeal Board, and was the Appellant before the United States Court of Appeals for the Federal Circuit. Petitioner is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

Respondent

Respondent is the Commissioner of the United States Patent and Trademark Office. Respondent is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the judgment in this case by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

In an administrative action, the United States Patent and Trademark Office, issued a Final Office Action on July 7, 2007, which refused Petitioner's two trademark applications at issue in this case. The refusal was upheld on administrative appeal to the United States Patent and Trademark Office, Trademark Trial and Appeal Board, Order on September 10, 2008. The United States Court of the Appeals for the Federal Circuit upheld the refusal by an Order and Judgment, July 1, 2009, and the Mandate issued, September 4, 2009. The United States Court of Appeals for the Federal Circuit by Order denied rehearing *en banc* on August 28, 2009.

STATEMENT OF JURISDICTION

The United States Court of the Appeals for the Federal Circuit issued its Order and Judgment, on July 1, 2009, and its Mandate issued, September 4, 2009. The United States Court of Appeals for the Federal Circuit issued its Order denying rehearing *en banc* on August 28, 2009. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutional provision reproduced in the Appendix at App. 83-84.

A. U.S. CONST. amend. V

B. 15 U.S.C. § 1052(a)

STATEMENT OF THE CASE AND FACTS

The following registrations were granted by the USPTO to *non-Indian* applicants with marks using the identical Indian tribe name used by the Petitioner, namely "SHINNECOCK" (Reg. No. 1447929); SHINNECOCK HILLS GOLF CLUB 1891 (Reg. No. 1447929); 1891 SHINNECOCK (Reg. No. 76408860); NICK'S SHINNECOCK MARINA (Reg. No. 0915793). (App. B).

The following registrations were granted to *non-Indian* applicants with marks using other Indian tribe names. CHEROKEE (Reg. No. 1663757), CHEROKEE (Reg. No. 2706122), CHEROKEE (Reg. No. 2881671), CHEROKEE BRAND (Reg. No. 0908927), APACHE (Reg. No. 2912969), CHIPPEWA (Reg. No. 0773714), TUSCARORA (Reg. No. 2417630), CAYUGA (Reg. No. 2396499), SENECA (Serial No. 78841901, published for opposition November 7, 2006, now Reg. No. 3201748). (App. B).

The following registrations were granted to *non-Indian* applicants with marks using names of deceased Indian persons. GERONIMO (Reg. No. 2274143), GERONIMO (No. 2629289), CRAZY HORSE (Reg. No. 2968623), SACAGAWEA (Reg. No. 2548215), KATONAH (Serial. No. 78727068, approved and published for opposition 12/12/07 (now abandoned)). (App. B).

The following registrations were granted to non-governmental applicants with marks denoting the United States and the states of New York and Michigan. U.S. STEEL (Reg. No. 2469301); AMERICAN TELEPHONE AND TELEGRAPH COMPANY (Reg. No. 1959591); NEW YORK DONOR EGG (Reg. No. 2984380); and MEA (Reg. No. 2124061). (Briefed by Petitioner, but not cited in the TTAB Opinion or any lower court opinion).

The same EA as in the present case granted an Indian corporation, organized under the laws of the Sac and Fox Nation, registration for the mark, SENECA (Reg. No. 2827776). In addition, a Notice of Allowance was granted by the USPTO on July 17, 2007, for the mark LUMBEE (Serial No. 78972292). (Briefed, but not considered part of the record by the TTAB; App. B).

The Petitioner is Shinnecock Smoke Shop, a sole proprietorship of Jonathan K. Smith, a member of the Shinnecock Indian Nation ("the Tribe"), residing and doing business on the Tribe's reservation, the Shinnecock Indian Reservation, located within the territorial boundaries of the State of New York. (App. F, G).

Petitioner filed applications to register the marks, SHINNECOCK BRAND FULL FLAVOR AND SHINNECOCK BRAND LIGHTS, serial numbers 78918061 and 78918500, on June 27, 2006 and June 28, 2006, respectively. After Office Actions and Responses by the Petitioner, the United States Patent and Trademark Office ("USPTO"), Examining Attorney ("EA"), made a final refusal to register based on a disputed determination that Petitioner's Tribe is a "person" within the meaning of the Section 2(a) prohibition under the Trademark Act, and rejected Applicant's claims of illegal discrimination under rights protected by the federal constitution and international treaty. (App. C).

On appeal to the USPTO, Trademark Trial and Appeal Board ("TTAB"), the EA's refusal was upheld under Section 2(a), but on a *different* determination, that Petitioner's Tribe is an "institution," first raised by the TTAB, without considering the disputed "person" issue. "Applicant and the Trademark Examining Attorney have argued at length on the question of whether the tribe is 'person' within the meaning of Section 2(a). We need not and do not decide that question, however, because regardless of whether the tribe is a 'person,' it clearly is an 'institution' and thus is protected under Section 2(a).' (App. B). The TTAB also rejected Petitioner's claims of discrimination. (App. B).

Petitioner submitted many examples of similarly situated marks which passed to registration when filed by non-Indians, which supported Petitioner's statutory construction of Section 2(a), and which supported claims of

discrimination if Petitioner's registrations were refused.

REASONS FOR GRANTING THE WRIT

This case presents the Court with a nationally important case involving the status of Native American Tribes under the Trademark Act as applied by the United States Patent and Trademark Office, and a documented history of illegal favorable treatment by the USPTO granting Non-Native American applications for similarly situated marks.

I. Native American trademark applicants should not be refused on the erroneous basis that Native American Tribes are "Persons" or "Institutions" under Section 2(a) of the Trademark Act.

The TTAB determined that the Shinnecock Indian Nation is an "institution" within the meaning of Section 2(a) of the Trademark Act. This "institution" issue was not briefed by the parties before the TTAB, and was not the Section 2(a) basis of refusal by the Examining Attorney. This was a linchpin issue, because if the Shinnecock Indian Nation is not an "institution" within the prohibition of Section 2(a), the mark must pass to registration.

The Trademark Act specifies that no distinctive trademark shall be refused registration unless it violates one of the statutory exceptions. 15 U.S.C. § 1052. One exception is if the mark "Consists of or comprises ... matter which may ... falsely suggest a connection with persons, living or dead,

institutions ...." 15 U.S.C. § 1052(a). "The PTO has the burden of proving that a trademark falls within a prohibition of Section 1052." *In re Mavety Maven Group*, 33 F.3d 1367, 1371 (Fed. Cir. 1994).

The Examining Attorney consistently took the same position and refused registration under Section 2(a) of the Trademark Act based on a determination that Applicant's Tribe constitutes "persons, living or dead" within the prohibition and meaning of 15 U.S.C. § 1052(a), citing, *In re White*, 73 USPQ2d 1713 (TTAB 2004)". The Examining Attorney's determination rested squarely *on In re White*.

The TTAB avoided dealing with the "person" issue in *In re White* by completely disregarding the Examining Attorney's "person" determination and Petitioner's arguments, and instead made a different determination that the Tribe is an "institution" and denied registration under Section 2(a). In making this "institution" determination, the TTAB cited no legal authority or analysis other than a general cite to *In re White*:

> Applicant and the Trademark Examining Attorney have argued at length on the question of whether the tribe is a 'person' within the meaning of Section 2(a).[5] We need not and do not decide that question, however, because regardless of whether the tribe is a 'person,' it clearly is an 'institution' and thus is protected under Section 2(a). *See In re White*, *supra*, (Apache tribes are

> 'institutions' for purposes of Section 2(a)).

(App. B)

The TTAB reliance on *In re White* for its "institution" determination appears to refer to the following language in the holding in *In re White*:

> We find that each federally recognized Apache tribe is necessarily either a juristic person or an institution.

In re White, 2004 TTAB LEXIS 529, at 12.

The analysis by the TTAB in *In re White* in support of this "person" holding applied the definition of 15 U.S.C. § 1127 to Section 2(a). *In re White*, 2004 TTAB LEXIS, at 10-12. There is no analysis or legal support cited in support of including the word "institution" in the holding in *In re White*.

On appeal to the United States Court of Appeals for the Federal Circuit ("the Federal Circuit"), the Federal Circuit "affirm[ed] the Board's conclusion that the Shinnecock Indian Nation is an 'institution' and thus falls within section 1052(a)'s protection." The Federal Circuit cited and heavily relied upon the TTAB case, *In re White*. (App. A)

Applicant's Tribe is neither a "Person" or "Institution" within the meaning of Section 2(a) of the Trademark Act

15 U.S.C. § 1052 (a)

Section 2(a) of the Trademark Act provides:

> [No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it-]
>
> (a) Consists of or compromises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with *persons, living or dead,* institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 2(9) of the Uruguay Round Agreements Act [19 USCS § 3501(9)] enters into force with respect to the United States. [emphasis added]

15 U.S.C. § 1127

Also known as Section 45 of the Trademark Act, 15 U.S.C. § 1127 includes a rule of construction, and a definition of "person":

> In the construction of this Act, *unless the contrary is plainly apparent from the context*—
>
> ...
>
> The term "person" and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this Act includes a juristic person as well as a natural person. The term "juristic person" includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law. [emphasis added]
>
> The term "person" also includes the United States, any agency or instrumentality thereof, or any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States. The United States, any agency or instrumentality thereof, and any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States, shall be subject to the provisions

> of this chapter in the same manner and to the same extent as any nongovernmental entity.
>
> The term "person" also includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

Regarding statutory construction, the United States Supreme Court has stated 'where ... the statute's language is plain, the "sole function of the courts is to enforce it according to its terms."' *U.S. v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1988).

Indian Tribes are nations. As Chief Justice John Marshall recognized in *Worcester v. Georgia*, 6 Pet. 515, 556-557 (1832):

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.... The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states.

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) Indian nations cannot be sued without their consent under the doctrine of sovereign immunity. *Martinez*, 436 U.S., at 58.

The broad definition of "person" in Section 1127 does not apply to Section 2(a) use of the phrase "persons, living or dead". It is plainly apparent from the context of Section 2(a) that the phrase "persons, living or dead" means *natural persons* because of the statute's use of the words "living or dead" following the word "persons". The language "persons, living or dead" in Section 2(a) is plain, and the rule of construction as to "context" in Section 1127 operates to exclude the Section 1127 definition of "person" from the phrase "persons, living or dead" in Section 2(a). *Ron Pair Enterprises.*

It would make no sense for a "juristic person" to be living or dead. In addition, the use of such a broad definition to extend from a natural person, to, a juristic person, strains and swallows the statutory language of section 2(a) because a juristic person would also include at least two separate statutory phrases, an "institution" as well as a "persons, living or dead".

In addition to the Section 1127 rule of construction as to "context" which limits its application, the textual language of Section 1127 contains a second limitation. The Section 1127

sentence beginning "The term 'person'" is followed by the limiting phrase, *"and any other word or term used to designate the applicant* or *other entitled to a benefit* or *privilege or rendered liable ...."* [emphasis added] The phrase "persons, living or dead" from Section 2(a) is plainly a prohibitive category barring registration, and plainly is not a phrase used to designate the applicant or other entitled to a benefit or privilege or rendered liable. A contrary interpretation defies the plain reading of the statute.

Petitioner's use of the term "SHINNECOCK" in the mark is no different than other private sector registrations of marks incorporating the name or initials of governments. For example, the "United States" and the states of "New York" and "Michigan," have not been treated as "persons, living or dead" under Section 2(a), nor have any other states. *e.g.*, U.S. STEEL, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, NEW YORK DONOR EGG, and MEA.

Petitioner's marks refers to his political sovereign, which is not a "person" or "juristic person" as found by the USPTO Examining Attorney or an "institution" as found by the TTAB, and applicant's registration is not barred by section 2(a).

Even if Section 1127 does apply, Indian tribes are not included in the Section 1127 definition of the term "person," or "juristic person."

Section 1127 expressly includes the United States and the states within the meaning of "person." However, Section 1127 does not expressly

include Indian Tribes within the meaning of "person," and the inclusion defies a plain reading of the statute.

For these reasons, the Federal Circuit erred in upholding the TTAB's ruling that Petitioner's Tribe is an "Institution," justifying a refusal to register under Section 2(a) of the Trademark Act.

II. Native American trademark applicants should not be refused when a historical pattern of practice of illegal racial discrimination is shown by documented grants of trademark registrations to non-Native American applicants of similarly situated trademarks.

Petitioner documented sampling of registrations granted to *non-Indians* clearly show that registrations are granted to *non-Indians* for marks which use not only the names of Indian tribes and Indian natural persons, but the identical Indian tribe name used in Petitioner's mark.

Racial Discrimination

Notably, the explanation for the documented pattern of registrations as set forth as discriminatory by Petitioner, was not raised by the EA, but was volunteered by the TTAB in its decision. i.e. proof problems. The EA did not raise such an explanation in the Final Office Action, and would be seriously constrained from doing so of course, because of the pending and post *In re White* applications pointed out by Petitioner.

The TTAB Decision determined that the refusal to register was not discriminatory in violation of Fifth Amendment due process and equal protection rights, as unsupported by the facts, and any right to relief was unavailable. (App. B).

The TTAB Decision determined that racial discrimination was not shown because all the marks may have passed to registration because of "proof problems" by the USPTO:

> It is entirely reasonable to assume that these registrations were issued not because the applicants therein were non-Indians, but rather because the elements of the Section 2(a) refusal were not or could not be proven by the Office.

(App. B)

The TTAB Decision went on to explain that, even assuming the registrations cited by Applicant were incorrectly issued, this does not justify issuing registrations to Applicant, citing *In re Boulevard Entertainment Inc.*, 334 F.3d 1336 (Fed. Cir. 2003).

> More fundamentally, even if all of the third-party registrations cited by applicant were issued inappropriately and should have been refused registration under Section 2(a), such errors by the Office would not justify the issuance of a registration to applicant in this case, where all of the

> elements of the Section 2(a) refusal clearly have been established.

(App. B)

The TTAB suggested alternative possible explanation that the registrations to non-Indians resulted from proof problems by the USPTO is not a reasonable explanation, since it also favors Petitioner. Turning a blind eye to the pattern of previous registrations to non-Indian applicants and claiming a proof problem, but raising the bar for Petitioner, is a form of racial discrimination. This apparent difference in standards continued even as this matter remained pending. *See,* LUMBEE. Clearly, Petitioner was treated differently than non-Indian applicants.

The Federal Circuit held there was no due process violation because Petitioner 'was provided a full opportunity to prosecute [his] applications and to appeal the examining attorney's final rejections to the Board.' (App. A). The Federal Circuit held that even if Petitioner's argument was correct, "such errors do not bind the USPTO to improperly register Applicant's marks." (App. A). This ruling effectively legitimizes discrimination in the USPTO by declaring there is simply no relief to an affected applicant such as Petitioner.

Fifth Amendment Due Process and Equal Protection

The due process clause, U.S. CONST., Amend. V, provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law;

The due process clause of the Fifth Amendment bars unjustifiable racial discrimination by the federal government in the same way the equal protection clause of the Fourteenth Amendment bars the states. *Bolling v. Sharpe*, 347 U.S. 497 (1954)(Holding segregation in D.C. public schools violative of due process clause of Fifth Amendment.). The same equal protection analysis applies. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)(Gender based Social Security benefits statute providing for payments to a decedent's wife, but not husband, entirely irrational and violative of due process clause of Fifth Amendment.).

In the present case, the above registration evidence shows a clear pattern of similarly situated marks passing to registration when filed by non-Indians, but refusal to an Indian. This is substantial evidence of unjustifiable racial discrimination. The TTAB Decision asserting possible proof problems with the non-Indian applicants is not a reasonable explanation of the approval pattern. The EA made *no effort* to justify the pattern.

The United Nations International Convention on the Elimination of All Forms of Racial Discrimination

In 1994, the United States ratified the *Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 ("CERD"). Fundamental obligations of the United States are found in Article 2 of CERD.

Article 2(1)(a)-(b) provides:

> (1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> a. Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups or persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

> b. Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

Article 5(a) of CERD provides:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> > a. The right to equal treatment before the tribunals and all other organs administering justice;

There is precedent that the United Nations' has found discriminatory actions of the United States with regard to Native Americans in violation of CERD.

The Office of the High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, issued concerns and recommendations directed to the United States with regard to land issues involving the Western Shoshone Tribe. (A/56/18, para. 400, adopted on 13 August 2001). The failure of the United States to

respond triggered further U.N. action. (Early Warning and Urgent Action Procedure, Decision 1(68), adopted on 8 March 2006). The United States has still not responded as of this date. U.N. High Commissioner for Human Rights letter to United States, 9 March 2007.

In the present case, the above analysis also shows racial discrimination in violation of Article 2(1)(a) of CERD, and a government's defense of its discrimination also violates Article 2(1)(b).

United States tribunals and organs, are obligated to prohibit racial discrimination and to provide equal treatment to the applicant under Article 5(a). A refusal to register this Indian applicant's mark while granting numerous registrations to non-Indians under similarly situated circumstances, violates the CERD obligations of the United States.

Although not a treaty, the U.N. General Assembly Declaration on the Rights of Indigenous Peoples, was adopted on September 13, 2007, which benefits Petitioner. The United States was one of only four countries to have noted against the Declaration.

CONCLUSION

The TTAB affirmed the EA's refusal to register Petitioner's marks on different grounds than that relied upon by the EA in the Final Office Action. The Federal Circuit affirmed. Petitioner showed below that his Tribe is obviously not a "Person" or

"Institution," and a refusal to register under Section 2(a) of the Trademark Act, under either ground was error. Further, Petitioner presented a documented *prima facie* case of discriminatory pattern of practice of the USPTO in previously, and even presently, granting trademark registrations to non-Native Americans with similarly situated marks.

FOR THE FOREGOING REASONS, Petitioner, Jonathan K. Smith, d/b/a Shinnecock Smoke Shop, respectfully requests this Court to reverse the United States Court of Appeals for the Federal Circuit, and remand this action to the United States Patent and Trademark Office, with instructions not to refuse registration of Serial Nos. 78918061 and 78918500 under Section 2(a) of the Trademark Act, and/or hold further proceedings on Petitioner's claim of racial discrimination.

Respectfully submitted,

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APPENDIX

[ENTERED JULY 1, 2009]

United States Court of Appeals
for the Federal Circuit

2009-1100
(Serial Nos. 78/918,061 and 78/918,500)

IN RE SHINNECOCK SMOKE SHOP

Scott Michael Moore, Moore International Law Offices, of New York, New York, argued for appellant.

Thomas V. Shaw, Associate Solicitor, Office of the Solicitor, United States Patent and Trademark Office, of Alexandria, Virginia, argued for the Director of the United States Patent and Trademark Office. With him on the brief were Raymond T. Chen, Solicitor, and Shannon M. Hansen, Associate Solicitor. Of counsel was Christina J. Hieber, Associate Solicitor.

Appealed from: United States Patent and Trademark Office
Trademark Trial and Appeal Board

United States Court of Appeals for the Federal Circuit

2009-1100
(Serial Nos. 78/918,061 and 78/918,500)

IN RE SHINNECOCK SMOKE SHOP

Appeal from the United States Patent and Trademark Office,
Trademark Trial and Appeal Board

DECIDED: July 1, 2009

Before MAYER, CLEVENGER, and SCHALL, Circuit Judges.

CLEVENGER, Circuit Judge.

In June 2006, Jonathan K. Smith (Applicant), a U.S. citizen and member of the Shinnecock Indian Nation and sale proprietor of Shinnecock Smoke Shop, filed two trademark applications with the United States Patent and Trademark Office (USPTO), seeking to register the marks SHINNECOCK BRAND FULL FLAVOR and SHINNECOCK BRAND LIGHTS (Serial Nos. 78/918,061 and 78/918,500 respectively) for cigarettes. Both marks also included the wording "MADE UNDER SOVEREIGN AUTHORITY."

The Trademark Examining Attorney (Examining Attorney) refused to register the proposed marks, citing Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), which generally

protects against registering marks that falsely suggest a connection to a non-sponsoring entity. Applicant appealed to the Trademark Trial and Appeal Board (Board) which affirmed because it agreed that the marks falsely suggested a connection with the non-sponsoring Shinnecock Indian Nation. The Board also rejected Applicant's constitutional and treaty-based claims that pertained to his allegations of racial discrimination. Applicant timely appealed the Board's decision to this court. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a)(4)(B). We affirm.

I

"This court reviews the Board's legal conclusions de novo, and its factual findings for substantial evidence." In re Pacer Tech., 338 F.3d 1348, 1349 (Fed. Cir. 2003) (citations omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," Consol. Edison Co. v. NLRB, 305 U.S. 197,229 (1983).

II

Title 15, section 1052(a) of the U.S. Code protects against marks that "falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols." Applicant does not contest that the marks falsely suggest a connection with the Shinnecock Indian Nation. Instead, he challenges the Board's determination that the Shinnecock Indian Nation is a "person[ ], living or dead, [or) institution[ )" under section 1052(a). We

affirm the Board's conclusion that the Shinnecock Indian Nation is an "institution" and thus falls within section 1052(a)'s protection.

To construe a statute, we begin with its text and look to the words' plain meaning. Bazalo v. West, 150 F.3d 1380, 1382 (Fed. Cir. 1998). Here, the ordinary meaning of "institution" suggests the term is broad enough to include a self-governing Indian nation. See Black's Law Dictionary 813, 1133 (8th ed. 2004) (defining "institution" as "(a]n established organization." and defining "organization" as a "body of persons ... formed for a common purpose"). Our construction is also in line with Board precedent that has specifically included Indian tribes under section 1052(a)'s protection in the past, see In re White, 73 USPQ2d 1713, 1718 (T.T.A.B. 2004) (finding that "each federally recognized Apache tribe is necessarily either a juristic person or an institution"), and with the Board's general practice of construing the statute in question as broadly applicable, see In re Urbano, 51 USPQ2d 1776, 1779 (T.T.A.B. 1999) (finding that SYDNEY 2000, "the entire organization which comprises the Olympic Games, as a whole, qualifies as an 'institution' within the meaning of Section 2(a) of the Trademark Act"); In re N. Am. Free Trade Assoc., 43 USPQ2d 1282, 1285 (T.T.A.B. 1997) (same for the North American Free Trade Agreement). We agree with the Board's conclusion that the Shinnecock Indian Nation is an "institution" under section 1052(a).

A

Applicant offers little substantive support for his contention that the Shinnecock Indian Nation is not an "institution" under section 1052(a). Instead. Applicant contends that the "institution" issue was not raised below. According to Applicant, the Examining Attorney rejected the marks based on her conclusion that the Shinnecock Indian Nation falls under the statute's protection for "persons" and that the Board therefore should not have affirmed the decision based on its "institution" determination. We disagree.

While the Examining Attorney focused on characterizing the Shinnecock Indian Nation as a "juristic person," she apparently did so based on her understanding that the terms "person," "juristic person," and "institution" all have the same meaning under section 1052(a). As evidence, the two sources that the Examining Attorney cited in explaining why the Shinnecock Indian Nation was subject to section 1052(a)'s false-suggestion protection both suggest such an approach. First, she cited section 1127 which provides,

> [t]he term "person" and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this Act includes a juristic person as well as a natural person. The term "juristic person" includes a firm, corporation, union, association, or other

> organization capable of suing and being sued in a court of law.

15 U.S.C. § 1127.

The Examining Attorney also cited In fa White, a case in which the Board held that "there is nothing in the language of the statute to suggest that the meaning of 'persons' or 'institutions' is any broader or narrower for one of these grounds for refusal as opposed to another." 73 USPQ2d at 1717. The Examining Attorney's approach explains why. despite her repeated references to "juristic persons," she ultimately concluded that "the tribe is a person or institution for purposes of the Trademark Act." It also explains why the Examining Attorney's brief before the Board cited two protected-institution cases, In re Urbano, 51 USPQ2d 1776, and In re N. Am. Free Trade Assoc., 43 USPQ2d 1282, and parenthetically noted that the Board's conclusion in each case was that the relevant organization qualified as an "institution."[1]

We are also confident that Applicant understood the Examining Attorney's position and was aware that the "institution" issue was in play. Applicant's own brief to the Board explained that after the initial rejection, he "filed . . . a request for reconsideration, arguing among other things, that the Tribe is not a person or institution within the

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[1] We offer no opinion as to whether the Examining Attorney's approach reflects a correct reading of "persons" or "institutions" under section 1052(a), a question beyond the scope of this appeal We merely acknowledge the issues raised under her approach

meaning of Section 2(a)." Applicant's concession betrays his contention that the "institution" issue was not raised below, and we conclude that the board did not err in affirming the rejection based on its" institution" determination.

B

As he did before the Board, Applicant also argues on appeal that the USPTO's refusal to register his marks, when the USPTO has granted supposedly similar marks also involving Indian tribe names to non-Indians, shows a pattern of racial discrimination in violation of the Due Process and Equal Protection clauses of the Fifth Amendment to the United States Constitution. Applicant contends that this alleged racial discrimination also violates the United States' treaty obligations under the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The Board rejected Applicant's allegations, and we agree that they are meritless.

There was no due process violation here because Applicant "was provided a full opportunity to prosecute (his) applications and to appeal the examining attorney's final rejections to the Board." In re Int'l Flavors & Fragrances Inc., 183 F.3d 1361, 1366 (Fed. Cir. 1999); see also Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (explaining that "[a]ll that is necessary" to satisfy due process "is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case"

(quoting Goldberg v. Kelly, 397 U.S. 254, 266-69 (1 970))). Applicant's allegations regarding similar marks are irrelevant because each application must be considered on its own merits. See In re Boulevard Entm't, 334 F.3d 1336, 1343 (Fed. Cir. 2003), Even if all of the third-party registrations should have been refused registration under section 1052(a), such errors do not bind the USPTO to improperly register Applicant's marks. See id.

We likewise reject Applicant's equal-protection argument for several reasons. First, allegations of disparate treatment, even if accurate, do not diminish the Board's and Examining Attorney's legitimate, nondiscriminatory reasons for denying registration. Even if his allegations were accurate, the most Applicant could establish is that the USPTO should have rejected the other marks. It does not follow that the proper remedy for such mischief is to grant Applicant's marks in contravention of section 1052(a).

Further, Applicant's argument is founded on unsupported assumptions. Applicant assumes that, unlike him, the successful applicants were non-Indians and that this is the reason why his applications were rejected whereas theirs were not. However, as the Board noted, Applicant has made no showing that any of the other registered marks were registered without the consent of the named tribal entities. Further, Applicant ignores substantive differences-either in the marks or in their associated goods and services-that might have made the other registrations less suggestive of a

false connection. We agree with the Board that "[i]t is entirely reasonable to assume that these registrations were issued not because the applicants therein were non-Indians, but because the elements of the Section 2(a) refusal were not or could not be proven by the Office." In re Shinnecock Smoke Shop, 2008 WL 4354159 at '6 (T.T.A.B. Sept. 10, 2008).

Applicant's reliance on CERD is likewise unavailing. In addition to Applicant's failure to establish any racial discrimination as noted above, Applicant has no private right of action under CERD, which is not a self-executing treaty. See Johnson v. Quander, 370 F. Supp. 2d 79, 101-102 (D.D.C. 2005) (CERD provisions are not self-executing and, thus, do not authorize a private right of action), affd, 440 F.3d 489 (D.C. Cir. 2006), cert. denied, 549 U.S. 945 (2006).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Trademark Trial and Appeal Board of the United States Patent and Trademark Office.

AFFIRMED

United States Court of Appeals for the Federal Circuit

2009-1100
(Serial Nos. 78/918061 and 78/918,500)

IN RE SHINNECOCK SMOKE SHOP

Judgment

ON APPEAL from the UNITED STATES PATENT AND TRADEMARK OFFICE TRADEMARK TRIAL AND APPEAL BOARD

in CASE NO(S). 78/918061 and 78/918,500

This CAUSE haVing been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED Jul 1 – 2009

/s/
Jan Horbaly, Clerk

ISSUED AS A MANDATE: SEP 04 2009

[ENTERED SEPTEMBER 10, 2008]

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
Sept. 10, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Shinnecock Smoke Shop

Serial No. 78918061
Serial No. 78918500

Scott Michael Moore of Moore International Law Offices, P.C. for Shinnecock Smoke Shop.

Kathleen de Jonge, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

Before Quinn, Hohein and Grendel, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

The appeals in the two above-captioned applications are hereby consolidated and shall be decided in this single opinion.[1]

The applicant in both applications is Shinnecock Smoke Shop, a sole proprietorship composed of Jonathan K. Smith, "a citizen of the United States and on-reservation member of the Shinnecock Indian Nation."

In application Serial No. 78918061, filed on June 27, 2006, applicant seeks registration on the Principal Register of the mark depicted below for "cigarettes" in Class 34.

The wording in the mark is SHINNECOCK BRAND, FULL FLAVOR, and MADE UNDER SOVEREIGN AUTHORITY. Applicant has disclaimed the exclusive right to use BRAND, FULL FLAVOR, and

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[1] In this opinion, for the most part we shall refer to applicant's "application" and "mark" in the singular. However, our findings and analysis should be understood to refer to both of the applications and both of the marks.

MADE UNDER SOVEREIGN AUTHORITY apart from the mark as shown.[2]

In application Serial No. 78918500, filed on June 28, 2006, applicant seeks registration on the Principal Register of the mark depicted below for "cigarettes" in Class 34.

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[2] The application includes a "Description of Mark" statement, which states:

> The mark consists of a RED background with darker RED swirls. In the center is a BLACK circle outlined in WHITE broken by a pipe. The pipe is BROWN with a YELLOW bowl and feathers attached that are BLACK at the top, with RED under the BLACK on one side and BLUE under the BLACK on the other side and ending in WHITE tips. In the center of the circle are a Native American woman with BLACK hair, a BROWN face and a WHITE dress with PINK and BLUE highlights, and a Native American man with feathers in his hair, a BROWN face, and a YELLOW shirt with fringe. RED, BLUE, WHITE and BLACK appear on the feathers in the man's hair and in decorations on the sleeve of his shirt. The woman is holding a BROWN flower and the man is holding a WHITE pipe. Between the man and woman is a rising PINK sun with a RED center and a YELLOW corona behind a WHITE flowering GREEN tobacco plant against BLACK mountains. The wording in the mark is WHITE.

The application includes a "Colors Claimed" statement which states: The color(s) red, green, yellow, brown, blue, black, white and pink is/are claimed as a feature of the mark."

The wording in the mark is SHINNECOCK BRAND, LIGHTS, and MADE UNDER SOVEREIGN AUTHORITY. Applicant has disclaimed BRAND, LIGHTS, and MADE UNDER SOVEREIGN AUTHORITY apart from the mark as shown.[3]

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[3] The application includes a "Description of "Mark" statement which states:

> The mark consists of a YELLOW background with WHITE swirls. In the center is a BLACK circle broken by a pipe. The pipe is BROWN with a YELLOW bowl and feathers attached that are BLACK at the top, with RED under the BLACK on one side and 3LUE under the BLACK on the other side and ending in WHITE tips. In the center of the circle are a Native American woman with BLACK hair, a BROWN face and a WHITE dress with PINK and BLUE highlights, and a Native American man with feathers in his hair, a BROWN face, and a YELLOW shirt with fringe. RED, BLUE, WHITE and BLACK appear on the feathers in the man's hair and in decorations on the sleeve of his shirt. The woman is holding a BROWN flower and the man is holding a WHITE pipe. Between the man and woman is a rising PINK sun with a RED center and a YELLOW corona behind a WHITE flowering GREEN tobacco plant against BLACK mountains. The wording in the mark is BLACK.

The application includes a "Colors Claimed" statement which states: "The color(s) RED, GREEN, YELLOW, BROWN, BLUE,

In each of the applications, the Trademark Examining Attorney has issued a final refusal to register the mark on the ground that it falsely suggests a connection with the Shinnecock Indian Nation (an Indian tribe located near Southampton, New York), and thus is unregistrable under Trademark Act Section 2(a), 15 U.S.C. §1052{a).

In each of the applications, applicant has appealed the final refusal to register. Applicant and the Trademark Examining Attorney have filed main appeal briefs in each case.[4]

After careful consideration of the evidence of record and the arguments presented, we affirm the refusal to register in each of the applications.

As noted above, applicant is a member of the Shinnecock Indian Nation. The record includes a printout from the tribe's website (www.shinnecocknation. com), which states that the Shinnecock Indian Nation is an Indian tribe located on eastern Long Island, New York, and that it "is among the oldest self-governing tribes of Indians in

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BLACK, WHITE and PINK is/are claimed as a feature of the mark.

[4] We sustain the Trademark Examining Attorney's objection to the evidence (pertaining to a third-party intent-to-use application (Ser. No. 78972292) to register the mark LUMBEE), submitted by applicant for the first time with applicant's appeal brief in each case. This evidence is untimely and shall be given no consideration. *See* Trademark Rule 2 142(d), 37 C F.R. §2.142(d). We note that our decision herein would be the same even if we had considered this untimely evidence.

the United States and has been a state-recognized tribe for over 200 years."

In pertinent part, Trademark Act Section 2 (a) prohibits registration of "matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." More specific to the case before us, the relevant provision of Section 2(a) is the prohibition of registration of "matter which may ... falsely suggest a connection with persons, living or dead, [or] institutions ." This Section 2(a) basis of refusal of registration is generally referred to as the "false suggestion of a connection" refusal.

Under our caselaw, there are four elements to this refusal. The Office must prove that: (1) the mark is the same as, or a close approximation of, the name or identity previously used by another person or institution; (2) the mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution; (3) the person or institution named by the mark is not connected with the activities performed by applicant under the mark; and (4) the fame or reputation of the person or institution *is* such that, when the mark is used with the applacant's goods or services, a connection with the person or institution would be presumed. *See In re White,* 73 USPQ2d 1713 (TTAB 2004); In re *Sloppy Joe's International Inc.*, 43 USPQ2d 1350 (TTAB 1997).

Initially, we note that Section 2(a) prohibits registration of a mark which falsely suggests a

connection with "persons, living or dead," or with "institutions." We find that the Shinnecock Indian Nation (the tribe of which applicant is a member) is an "institution" within the meaning of Section 2(a). Applicant and the Trademark Examining Attorney have argued at length on the question of whether the tribe is a "person" within the meaning of Section 2(a).[5] We need not and do not decide that question, however, because regardless of whether the tribe is a "person," it clearly is an "institution" and thus is protected under Section 2(a). *See In* re *White, supra,*

(Apache tribes are "institutions" for purposes of Section 2(a)). If applicant's mark falsely suggests a connection with the Shinnecock Indian Nation, an "institution" within the meaning of Section 2(a), then registration must be refused. We turn now to the substantive elements of the refusal.

First, however, we find it to be significant that applicant, throughout the examination process and in its appeal brief, has presented absolutely no evidence or argument with respect to the elements of

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[5] In brief, applicant argues that even though the definition of "person" set forth in Trademark Act Section 45, 15 U.S.C. §1127, specifically includes not only natural persons but juristic persons, the words "persons, living or dead" in Section 2(a), in context, must be read to refer solely to natural persons and not juristic persons because only natural persons, not juristic persons, can be "living or dead." This argument disregards the controlling case law going back at least as far as the Federal Circuit's seminal Section 2(a) decision in *The university* of Notre *Dame* du *Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). These cases have repeatedly found that the word "persons" in Section 2(a) encompasses juristic persons, not just natural persons.

the Trademark Examining Attorney's Section 2(a) "false suggestion of a connection" refusal. We deem applicant's failure to even mention the elements of the refusal as being tantamount to a concession that the Office has established each of those elements. However, because the burden of establishing each of the elements of the refusal is on the Office, we shall proceed to determine whether the Office has presented evidence sufficient to support the refusal. We find that it has.

Under the first element of the refusal, we find that the mark applicant seeks to register consists of or comprises matter, namely, the word SHINNECOCK, which is the same as or a close approximation of the name or identity previously used by another institution, i.e., the Shinnecock Indian Nation. The tribe's website shows that the tribe identifies itself and repeatedly refers to itself by the name "Shinnecock Indian Nation" or some other variation which includes the word "Shinnecock" or "Shinnecocks." It is not dispositive that the words "Indian Nation" included in the tribe's name do not appear in applicant's mark, nor is it dispositive that the mark includes other wording which is not included in the tribe's name. *See In* re *White,* 80 USPQ2d 1654, 1658 (TTAB 2006; *In re White, supra,* 73 USPQ2d at 1719; *In* re *Urbano,* 51 USPQ2d 1776, 1778 (TTAB 1999) (Section 2(a) determination is based on "the relevant portion" of the applicant's mark). For these reasons, we find that the first element of the Section 2(a) "false suggestion of a connection" refusal has been established. Again, applicant does not contend otherwise.

Under the related second element of the refusal, we find that the word SHINNECOCK in applicant's mark, in 'addition to being the same as or a close approximation of the tribe's name or identify, would in fact be recognized as such in that it points uniquely and unmistakably to the tribe. The evidence submitted by the Trademark Examining Attorney with her first and final Office actions includes printouts of excerpted news articles involving the tribe in which the tribe always is identified and referred to as "the shinnecocks" or some variation thereof. Moreover, on this record, SHINNECOCK has no other significance than as the name of the tribe. For these reasons, we find that the second element. of the Section 2(a) "false suggestion of a connection" refusal has been established. Applicant does not contend otherwise.

Under the third element of the refusal, we find that the person or institution named by the mark, i.e., the Shinnecock tribe, is not connected with the activities performed by applicant under the mark. Applicant's mere membership in the tribe does not suffice; applicant is not the only member of the tribe. Nor does the tribe's awareness of applicant's activities suffice as the requisite connection (assuming that such awareness In fact exists). There must be a specific commercial connection between applicant and the tribe, evidencing the tribe's endorsement or sponsorship of applicant's sale of cigarettes. *See In* re *White, supra,* 80 USPQ2d at 1660-61. There is no evidence of the requisite specific commercial connection in this case. Thus, the third element of the "false suggestion of a

connection" refusal has been established. Applicant does not contend otherwise.

The fourth and final element of the refusal in this case requires a showing that the fame or reputation of the name appropriated by the applicant is such that, when applicant's mark is used in connection with applicant's goods, purchasers would mistakenly presume that a commercial connection exists between the named person or institution and the applicant. This element does not require a fame analysis like that which might be relevant to a Section 2(d) likelihood of confusion analysis or a Section 43(c) dilution analysis. Rather,

> ...the key is whether the name per se is unmistakably associated with a particular person or institution and, *as used* would point uniquely to the person or institution. In short, it is the combination of (1) the name of sufficient fame or reputation and (2) its use on or in connection with particular goods or services, that would point consumers of the goods or services uniquely to a particular person or institution.

In re White, *supra*, 73 USPQ2d at 1720 (emphasis in original).

We find in this case that the fame and reputation of the Shinnecock tribe is such, and the nature of applicant's particular goods (cigarettes) is such, that applicant's use of its SHINNECOCK mark on cigarettes will lead purchasers to mistakenly presume that a commercial connection exists

between the tribe and applicant and applicant's cigarettes.

First, we find that the Shinnecock Indian Nation and its Shinnecock name are well-known, especially to residents in the geographic area (eastern Long Island) occupied by the tribe and to visitors to the reservation and surrounding area. The tribe's website informs readers that "[t]he Shinnecock Nation is among the oldest self-governing tribes in the United States and has been a state-recognized tribe for over 200 years." The tribe's reservation is located adjacent to the town of Southampton on Long Island. The evidence of record includes excerpts and abstracts from news articles (including articles from The New York Times) which specifically refer to and discuss the Shinnecocks by name. The Tribe's website shows that, since 1946, the tribe has conducted an annual Powwow event which now "hosts thousands of visitors." Superpages.com identifies Shinnecock Indian Outpost as a "Southampton, NY Attraction": "This funky shop sells tax-free cigarettes, American Indian crafts, clothes, and glassware."

Second, we find that applicant's particular goods, cigarettes, are such that use of the name SHINECOCK in connection therewith will lead purchasers to mistakenly presume the existence of a commercial connection between applicant's cigarettes and the Shinnecock tribe.

The record shows that Indian tribes, in general, are known to manufacture and market cigarettes. The record includes printouts of the

Internet websites of two Native American cigarette retailers, "Black Hawk Tobacco" and "Smokin Joes." The Black Hawk Tobacco website informs the public that "[wle are a Native American owned and operated company located on Sovereign Native American land selling Native American made tobacco products to Native Americans and Non-Native Americans. Because we are located on the Sovereign Agua Caliente Reservation we can legally sell our native American made cigarettes and tobacco products nation-wide." The Smokin Joes website offers "[p]ure Indian Cigarettes and all Natural Indian Cigarettes. We also sell the highest quality Native American Brand cigarettes, Native American made Cigarettes, Reservation Cigarettes and More. We are the #1 on-line Indian Cigarette Source." The website also informs purchasers that Smokin Joes sells "Indian Cigarettes straight from the Indian cigarette reservations."

Not only are cigarette purchasers aware that Native American tribes in general manufacture and market cigarettes, they are aware that Shinnecock Indians in particular are involved in the marketing of cigarettes. The Shinnecocks operate nine smoke shops on Long Island, including three on the reservation. An article in the March 11, 2000 New York Daily News informs readers:

> NEW YORK - There are other ways to save money on cigarettes than buying them illegally from a smuggler. One of them is to drive out to the Shinnecock Indian Reservation in Southampton, where cigarettes cost about $3 a pack and $28.50 a carton.

> They're tax-free and legal. Off the reservation, cigarettes on Long Island go for as much as $5 a pack and $41 a carton.
>
> On his way to make a cigarette purchase, Joseph Sgroi, 46, said he didn't mind driving more than an hour from his home in Long Beach, to the reservation to buy three cartons. "You can't beat the prices," he said.
>
> As a result of last week's big jump in the state tax on cigarettes, more smokers like Sgroi are flocking to the reservation's three Montauk Highway smoke shops. The Shinnecock Nation is one of nine tribes in New York state with Indian sovereignty. As such state tax laws aren't enforceable on their land.

An article in the July 14, 2004 Providence Journal (RI) informs readers that "The Shinnecocks operate nine smoke shops on Long Island..." An article in the November 6, 2006 edition of The New York Times informs readers that "The tax-free sale of steeply discounted cigarettes keeps the Shinnecock Indians alive...".

Based on these and other news articles in the record, we find that cigarette purchasers are aware that the Shinnecocks market cigarettes, and that upon encountering cigarettes sold under applicant's SHINNECOCK mark they would mistakenly presume the existence of a commercial connection between applicant's cigarettes and the Shinnecock tribe.

Additionally, there is other wording in applicant's mark that would do nothing but reinforce and exacerbate purchasers' mistaken presumption that a commercial connection exists between applicant's cigarettes and the Shinnecock tribe. Specifically, the wording MADE UNDER SOVEREIGN AUTHORITY, when used in connection with the name SHINNECOCK, obviously would be understood by purchasers to mean that applicant's cigarettes are authorized, endorsed or approved by the Shinnecock tribe. Applicant has stated (in response to the Trademark Examining Attorney's inquiry in her first Office action) that the words SOVEREIGN AUTHORITY in the mark are intended to refer to God. However, the evidence of record clearly establishes that, when used in connection with Indian tribes, the word SOVEREIGN has a particular meaning and significance, referring to the sovereign status of the tribal nations under the laws and Constitution of the United States. Thus, even if applicant subjectively intends the words SOVEREIGN AUTHORITY to refer to God, that is not the meaning that purchasers will attribute to the words when used in connection with applicant's cigarettes.

For all of these reasons, we find that the fourth element of the Section 2(a) refusal has been established. Applicant does not contend otherwise.

Because all four elements of the refusal have been established, we conclude that applicant's mark falsely suggests a connection with the Shinnecock Indian Nation, and that the refusal of registration under Section 2(a) is entirely warranted.

As noted above, applicant has presented no evidence or argument with respect to the substantive elements of the Section 2(a) refusal. Instead, applicant has argued at length that the Office's refusal to register the mark is based on racial discrimination, i.e., because applicant is a Native American. According to applicant, this racial discrimination violates applicant's constitutional due process and equal protection rights under the Fifth Amendment of the United States Constitution. Applicant also argues that this alleged racial discrimination by the Office, an agency of the United States, violates the United States' obligations under the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

Applicant bases his racial discrimination claims on the fact that the Office in the past has issued, to non-Indians, registrations of marks consisting of or comprising the names of Indian Tribes or Indian historical personages. Applicant has submitted copies of the following extant third-party registrations:

- Reg. No. 1447929, of the mark SHINNECOCK HILLS GOLF CLUB for country club and restaurant services;
- Reg. No. 2739914, of the mark 1891 SHINNECOCK for golf clothing and equipment;

Reg. No. 1663757, of the mark CHEROKEE for cutlery;

Reg. No. 2706122, of the mark CHEROKEE for sunrooms, doors, etc.;

Reg. No. 2881671, of the mark CHEROKEE for horse trailers;

- Reg. No. 0908927, of the mark CHEROKEE BRAND for piano wire;

Reg. No. 2912969, of the mark APACHE for bicycles;

Reg. No. 0773714, of the mark CHIPPEWA for boots and shoes;

Reg. No. 2417630, of the mark TUSCARORA for cigars;

Reg. No. 2396499, of the mark CAYUGA for fishing reels;

Reg. No. 2274143, of the mark GERONIMO for tobacco leaves;

- Reg. No. 2629289, of the mark GERONIMO for tires;

- Reg. No. 2968623, of the mark CRAZY HORSE for cigarettes; and

- Reg. No. 2548215, of the mark SACAGAWEA for commemorative coins.

- Applicant also cites to Reg. No. 2827776, of the mark SENECA for cigarettes, which issued to the Sac and Fox nation, not the Seneca tribe.

Applicant has not proven, but we shall assume arguendo, that the owners of these registrations are non-Indians and/or that the registrations were issued without the consent of the tribal entities named in the marks.

Comparing his application to these third-party registrations, applicant argues that "[i]n the present case, registration is refused for a mark using the name of an Indian tribe. The only difference is on the facts, where the present applicant is an Indian.

There is absolutely no legal basis for this discriminatory treatment." (Brief at 12; emphasis in original.)

This argument is unpersuasive. The fact that applicant is a Native American clearly is not the only factual difference between applicant's application and the third-party registrations. Rather, each of the third-party registrations covers marks and/or goods which are not the same as applicant's. As might be expected in view of applicant's failure to even mention the substantive elements of the Section 2(a) "false suggestion of a connection" refusal at issue in this case, applicant's racial discrimination argument completely disregards the substantive elements of the refusal. It is entirely reasonable to assume that these registrations were issued not because the applicants therein were non-Indians, but rather because the elements of the Section 2(a) refusal were not or could not be proven by the Office.

In particular, applicant disregards the fourth element's requirement that the refusal must be based on a consideration of the fame of the name of the person or institution depicted in the mark as applied to the goods or services identified in the application or registration. Otherwise, the effect of the Section 2(a) refusal would be the grant of an impermissible right in gross to the entity named in the mark. *See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., supra*, 217 USPQ at 509. Except for the four thired-party registrations which cover tobacco products (discussed below), the goods and services identified in each of the third-

party registrations (including the two SHINNECOCK third-party registrations), on their face, do not appear to be the types of goods or services (e.g., piano wire and bicycles) that purchasers necessarily would associate with the named Indian tribes or personages. Purchasers therefore would not expect or mistakenly presume that there was any commercial connection between the named tribes and the applicants or their goods. Absent proof of such a mistaken presumption of a connection, the Section 2(a) "false suggestion of a connection" refusal could not be maintained by the Office, regardless of the applicant's race.

Four of the third-party registrations cited by applicant do indeed cover the same goods as those identified in applicant's application, i.e., tobacco products. They are registrations of the marks TUSCARORA for cigars, GERONIMO for tobacco leaves, CRAZY HORSE for cigarettes, and SENECA for cigarettes. Even as to these registrations, the race of the applicant is not the only fact distinguishing applicant's application from the registrations. Obviously, the registered marks and applicant's mark are different as well. It is likely that the reason these registrations were issued was that the Office failed to locate evidence sufficient to establish all four of the elements of the "false suggestion of a connection" refusal.

More fundamentally, even if all of the third-party registrations cited by applicant were issued inappropriately and should have been refused registration under Section 2(a), such errors by the Office would not justify the issuance of a registration

to applicant in this case, where all of the elements of the Section 2(a) refusal clearly have been established. Although consistency in examination is the Office's goal, every application must be considered on its own merits. *See In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). Nor does the fact that registration to applicant has been refused notwithstanding the issuance of these other registrations constitute a denial of applicant's constitutional rights to due process and equal protection. As our primary reviewing court has previously stated:

> The fact that, whether because of administrative error or otherwise, some marks have been registered even though they may be in violation of the governing statutory standard does not mean that the agency must forgo applying that standard in all other cases. The TTAB's decision in this case therefore does not violate the constitutional principles that Boulevard invokes.

In re Boulevard Entertainment Inc., 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003). See also *In re Litehouse Inc.*, 82 USPQ2d (TTAB 2007).

For all of these reasons, we find that applicant's Fifth Amendment due process and equal protection arguments based on the Office's alleged racial discrimination against applicant are unsupported by the facts and that they are

unavailable in any event under *In re Boulevard Entertainment Inc., supra.*

Applicant's reliance on The Convention on the Elimination of All Forms of Racial Discrimination (CERD), ratified by the United States in 1994, likewise is unavailing. First, as noted above, applicant has failed as a factual matter to establish that the Office's refusal to register applicant's mark is based on racial discrimination, as contemplated in the CERD or otherwise. Rather, we find that the refusal is based on the Office's proper application of the provisions of Section 2(a) of the Trademark Act.

In any event and more fundamentally, applicant's reliance on the CERD is unavailing because the CERD is not a self-executing treaty which affords applicant an independent or direct cause of action here.[6] The United States Senate's 1994 ratification of the Convention expressly declared: "The Senate's advice and consent is subject to the following declaration: That the United States declares that the provisions of the Convention are not self-executing." The non-self-executing nature of the CERD has been specifically affirmed by the courts. *See, e.g., Johnson v. Quander*, 370 F.Supp.2d 79, 101-102 (D.D.C. 2005) (CERD provisions are not self-executing and thus do not authorize a private right of action under the CERD), *aff'd* 440 F.3d 489 (D.C. Cir.), *cert. denied*, 127 S.Cr. 103 (2006).

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[6] Applicant is incorrect in arguing that the United States Senate is not entitled to declare that a treaty is not self-executing. *See generally In re Rath*, 402 F.3d 1207, 74 USPQ2d 1174 (Fed. Cir. 2005) (Paris Convention not self-executing).

Based on these authorities, we find that the CERD is not self-executing, and that it affords applicant no independent basis for challenging the Office's refusal to register applicant's mark.

In summary, we find that the Office has established all four elements of the Section 2(a) "false suggestion of a connection" refusal and that Section 2(a) therefore bars registration of applicant's marks. We also find that applicant's claims of racial discrimination under the U.S. Constitution and under the CERD are without merit.

Decision: The refusal to register is affirmed with respect to each of the applications.

Document Description: **Offc Action Outgoing Mail / Create Date: 07-Jul-2007**

To: SHINNECOCK SMOKE SHOP (smm@milopc.com)

Subject: TRADEMARK APPLICATION NO. 78918061 - SHINNECOCK BRAND LIG - N/A

Sent: 7/7/2007 12:41:14 PM

Sent As: ECOM107@USPTO.GOV

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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/918061

MARK: SHINNECOCK BRAND FUL

78918061

CORRESPONDENT ADDRESS:
SCOTT MICHAEL MOORE, ESQ.
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NEW YORK, NY 10111-0100

RESPOND TO THIS ACTION:
http://www.uspto.gov/teas/eTEASpageD.htm

GENERAL TRADEMARK INFORMATION:
http://www.uspto.gov/main/trademarks.htm

APPLICANT: SHINNECOCK SMOKE SHOP

CORRESPONDENT'S REFERENCE/DOCKET NO:
N/A

CORRESPONDENT E-MAIL ADDRESS:
smm@milopc.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 7/7/2007

THIS IS A FINAL ACTION.

This is in response to the applicant's response filed on June 4, 2007 (hereinafter "Appl's Response").

$50 Fee Due – Response not Filed Via TEAS

The applicant must submit an additional application processing fee of $50 per class because the applicant has not complied with the requirement to file responses to Office actions via the Trademark Electronic Application System (TEAS). 37 C.F.R. §§2.6(a)(iv), 2.23(a)(1) and 2.23(b).

Disclaimer, Drawing, Legal Entity Information and Statement

The amended disclaimer, new drawing, amended legal entity and explanation of the wording "MADE UNDER SOVEREIGN AUTHORITY" are acceptable.

The refusal under Trademark Act Section 2(a), 15 U.S.C. §1052(a), is now made FINAL for the reasons set forth below. In addition, the following requirement is now made FINAL: acceptable color claim. 37 C.F.R. §2.64(a).

Final Refusal – False Connection

Registration is refused because the proposed mark consists of or comprises matter which may falsely suggest a connection with the Shinnecock Indian Nation of New York, a New York state recognized tribe. Although not connected with the goods the applicant provides under the proposed mark, the Shinnecock Indian Nation and its commercial enterprises is so famous that consumers would presume a connection. Trademark Act Section 2(a), 15 U.S.C. §1052(a); TMEP §§1203.03, 1203.03(e) and 1203.03(f); *See generally University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Nuclear Research Corp.*, 16 USPQ2d 1316 (TTAB 1990); *University of Alabama v. BAMA-Werke Curt Baumann*, 231 USPQ 408 (TTAB 1986); *In re Cotter & Co.*, 228 USPQ 202 (TTAB 1985); *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428 (TTAB 1985).

The following is required for a showing of false connection under Section 2(a):

- the mark sought to be registered is the same as or a close approximation of the name or identity of a person or institution;
- the mark would be recognized as such;
- the person or institution identified in the mark is not connected with the goods sold or services performed by the applicant under the mark; and
- the fame or reputation of the named person or institution is of such a nature that a connection with such person or

> institution would be presumed when the applicant's mark is used on its goods or services.

In re Nuclear Research Corp., 16 USPQ2d 1316 (TTAB 1990); *In re Cotter & Co.*, 228 USPQ 202, 204 (TTAB 1985); *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428, 429 (TTAB 1985).

"Shinnecock" identifies an Indian tribe located in Southampton, New York. See attached evidence from the tribe's official website, located at http://www.shinnecocknation.com/history.asp. Printouts of articles downloaded from the Internet are admissible as evidence of information available to the general public, and of the way in which a term is being used by the public. TMEP §710.01(b). *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1475-76 (TTAB 1999); *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370-1 (TTAB 1998).

Indian tribes have been determined to be juristic persons by the Trademark Trial and Appeal Board. See, e.g., *In re White*, 73 USPQ2d 1713 (TTAB 2004).

Consumers are likely to recognize that the term "Shinnecock" describes the tribe. The Shinnecocks operate nine smoke shops on Long Island. See attached evidence from "*Tribe Marks One Year Since Smoke-Shop Raid*" (Providence Journal 7/15/2004), located at http://www.shinnecocknation.com/news/news112.asp

The tribe allows the operation of three smoke shops that sell tax-free cigarettes on tribal lands. See attached evidence from *Indian Smoke Shops*

Doing Brisk Business - No Sales Tax [03/13-6], located at http://www.no-smoking.org/march00/03-13-00-6.html. Consumers of cigarettes are likely to be aware that cigarettes are manufactured and/or sold on numerous Indian reservations. See, e.g., evidence attached to first Office action from www.blackhawktobacco.com and www.smokenatives.com.

The Shinnecock Indian Nation is not the applicant, thus, the applicant's proposed mark falsely suggests a connection with the tribe. Although the application indicates that the applicant's proprietor is an on-reservation member of the Shinnecock Indian Nation, there is nothing in the record to show that the tribe has granted the applicant the right to use the tribal name. As the Trademark Trial and Appeal Board recently noted in *In re White*, *supra*, "the key is whether the name per se is unmistakably associated with a particular person or institution and, *as used* would point uniquely to the person or institution. In short, it is the combination of (1) the name of sufficient fame or reputation and (2) its use on or in connection with particular goods or services, that would point consumers of the goods or services uniquely to a particular person or Institution." *White*, 73 USPQ2d at 1721 (affirming refusal of an application filed by an individual member of the St. Regis Band of Mohawk Indians for the mark "APACHE" for cigarettes) (emphasis in original).

Use of the name "SHINNECOCK" on or in connection with cigarettes would point consumers of the cigarettes uniquely to the Shinnecock Indian Nation. The Shinnecocks are well-known in

connection with cigarettes (see attached excerpts from articles in *The New York Times* located at: http://216.239.51.104/search?q=cache:s8dVC0mpR_sJ:topics.nytimes.com/top/reference/timestopics/subjects/i/indians_american/index.html%3Fquery%3DSHINNECOCK%2520INDIANS%26field%3Ddes%26match%3Dexact+Shinnecock+cigarettes&hl=en&ct=clnk&cd=4&gl=us and http://216.239.51.104/search?q=cache:tA-LG0qL5hcJ:www.discount-cigarettes.org/nytimes.html+Shinnecock+cigarettes&hl=en&ct=clnk&cd=1&gl=us; the attached "action alert" press release located at http://216.239.51.104/search?q=cache:La07UEodZkMJ:www.nycclash.com/alerts.html+Shinnecock+cigarettes&hl=en&ct=clnk&cd=15&gl=us; the attached "superpages" ad located at http://216.239.51.104/search?q=cache:s1DGVULqQlYJ:www.superpages.com/cities/mtg/94742/+Shinnecock+cigarettes&hl=en&ct=clnk&cd=26&gl=us); and the attached *Indian Country Today* article located at http://216.239.51.104/search?q=cache:c_Nh3ZEF7vIJ:www.indiancountry.com/content.cfm%3Fid%3D1096414632+Shinnecock+cigarettes&hl=en&ct=clnk&cd=30&gl=us).

The Shinnecock Indian Nation is a Person Under the Trademark Act

The applicant argues that "The Shinnecock Indian Nation is not a natural person. Therefore, section 1052(a) cannot be used to refuse registration on the basis of a false connection" (Appl's Response at 4), and that "The Shinnecock Indian Nation is not a

"person" for the reason that the Shinnecock Indian Nation is a sovereign governmental entity with jurisdiction over the Shinnecock Indian Reservation." (Appl's Response at 4).

This argument is without merit. The United States is considered a person for purposes of the Trademark Act.

> The term "person" and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this Act includes a juristic person as well as a natural person. The term "juristic person" includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law.
>
> The term "person" also includes the United States, any agency or instrumentality thereof, or any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States. The United States, any agency or instrumentality thereof, and any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

Trademark Act §45; 15 USC §1127.

Likewise, Indian tribes have been determined to be juristic persons by the TTAB. *In re Julie White*, 73 USPQ2d 1713 (TTAB 2004). The applicant's argument that the Shinnecock Indian Nation has been recognized as an Indian tribe by the State of New York and by the federal courts under federal common law seems only to support the trademark examining attorney's position that the tribe is a person or institution for purposes of the Trademark Act and to bolster the trademark examining attorney's arguments that the Shinnecock are a well-known tribe.

Due Process Argument Does Not Apply

The applicant's second argument is that the USPTO's denial of registration is a violation of the due process clause of the Fifth Amendment to the United States Constitution because the denial is based on the applicant's Indian status and that other marks have been allowed to register.

The controlling precedent on this issue is clear and forecloses this challenge. A similar due process claim was made in *In re The Boulevard Entertainment, Inc.*, 334 F.3d 1336 (Fed. Cir. 2003); the constitutional arguments failed.

Furthermore, the TTAB is an administrative tribunal and accordingly has no authority to make findings regarding constitutional claims. *See* TBMP §102.01 (2d ed. rev. 2004), and the authorities cited therein.

Decisions by Past Examiners

The issuance of some registrations with tribal names to non-Indians does not establish racial discrimination. The applicant has merely recited third-party registrations, without regard for the goods and/or services recited therein. As explained in *In re White*, the test for finding a false connection looks at the *combination* of a name of sufficient fame or reputation *and its use on or in connection with particular goods or services*. *White*, 73 USPQ2d at 1721 (emphasis added).

Moreover, the TTAB has consistently disagreed that the USPTO must take a similar or identical action in a current case as it did in an action from the past even if either the past action or the current action was and/or is erroneous under the law. As stated by the Commissioner in *In re Stenographic Machines, Inc.*, 199 USPQ 313, 317 (Comm. 1979): "Consistency of Office practice must be secondary to correctness of Office practice. The present case must be determined on the basis of the facts presented." While uniform treatment under the Trademark Act is highly desirable, the statutory duty under the Trademark Act is to determine, based upon the record, whether the applicant's mark is registrable. The determination of registrability of a particular mark by a prior trademark examining attorney cannot control the merits of a current case. *See McDonald's Corp. v. McClain*, 37 USPQ2d 1274 (TTAB 1995); *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994). Neither the TTAB nor any court is bound by prior decisions of trademark examining attorneys, and each case must be decided on its own

merits, on the basis of the record therein. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). *See also In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001).

Highlighting inconsistency by the Office in various contexts does not establish any improper motive behind the inconsistency. A similar constitutional argument was made in *In re The Boulevard Entertainment, Inc.*, 334 F.3d 1336 (Fed. Cir. 2003). In denying the due process claim, the Federal Circuit stated:

> The fact that, whether because of administrative error or otherwise, some marks have been registered even though they may be in violation of the governing statutory standard does not mean that the agency must forgo applying that standard in all other cases. The TTAB's decision in this case therefore does not violate the constitutional principles that Boulevard invokes.

Boulevard Entertainment, 334 F.3d at 1343.

International Treaty Argument Does Not Apply

Finally, the applicant asserts that the refusal to register violates the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination. Regarding the applicant's treaty claim, the applicant cannot relay on the treaty because it is not self-executing (see attached

evidence from http://www.hri.ca/fortherecord1997/documentation/reservations/cerd.htm). Thus, the applicant cannot claim a private right of action based on the treaty. *See, e.g., In re Rath* (402 F.3d 1207) (Fed. Cir. 2005) (the Paris Convention is not "self executing" and thus cannot override the statutory prohibition against registering surnames that have not acquired distinctiveness).

In conclusion: given that the applicant is not the Shinnecock Indian Nation, use of the proposed mark on cigarettes falsely suggests a connection with the tribe. Therefore, the refusal to register under Section 2(a) of the Trademark Act is made final.

Final Refusal – Acceptable Color Claim Required

The requirement for an acceptable color claim likewise is made final. The amended color claim is unacceptable because it merely lists colors, without including any color claim language. Therefore, the applicant must amend the color claim, referencing all the colors appearing in the drawing of the mark. 37 C.F.R. §2.52(b)(1); TMEP §807.07(a)(ii). The following color claim is suggested: "The colors red, green, yellow, brown, blue, black, white and pink are claimed as a feature of the mark."

Response Guidelines

If the applicant fails to respond to this final action within six months of the mailing date, the application will be abandoned. 15 U.S.C. §1062(b);

37 C.F.R. §2.65(a). The applicant may respond to this final action by:

(1) submitting a response that fully satisfies all outstanding requirements, if feasible (37 C.F.R. §2.64(a)); and/or

(2) filing an appeal to the Trademark Trial and Appeal Board, with an appeal fee of $100 per class (37 C.F.R. §§2.6(a)(18) and 2.64(a); TMEP §§715.01 and 1501 *et seq.*; TBMP Chapter 1200).

In certain circumstances, a petition to the Director may be filed to review a final action that is limited to procedural issues, pursuant to 37 C.F.R. §2.63(b)(2). 37 C.F.R. §2.64(a). *See* 37 C.F.R. §2.146(b), TMEP §1704, and TBMP Chapter 1201.05 for an explanation of petitionable matters. The petition fee is $100. 37 C.F.R. §2.6(a)(15).

Note – TEAS Plus Applicants

TEAS PLUS APPLICANTS MUST SUBMIT DOCUMENTS ELECTRONICALLY OR SUBMIT FEE: TEAS Plus applicants should submit the following documents using the Trademark Electronic Application System (TEAS) at http://www.uspto.gov/teas/index.html: (1) written responses to Office actions; (2) preliminary amendments; (3) changes of correspondence address; (4) changes of owner's address; (5) appointments and revocations of attorney; (6) amendments to allege use; (7) statements of use; (8) requests for extension of time to file a statement of use, and (9) requests to

delete a §1(b) basis. If any of these documents are filed on paper, they must be accompanied by a $50 per class fee. 37 C.F.R. §§2.6(a)(1)(iv) and 2.23(a)(i). Telephone responses will not incur an additional fee. NOTE: In addition to the above, applicant must also continue to accept correspondence from the Office via e-mail throughout the examination process in order to avoid the additional fee. 37 C.F.R. §2.23(a)(2).

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.

/Kathleen de Jonge/
Examining Attorney, Law Office 107
(571) 272-9152
(571) 273-9107 (fax)

RESPOND TO THIS ACTION: If there are any questions about the Office action, please contact the assigned examining attorney. A response to this Office Action should be filed using the Office's Response to Office action form available at http://www.uspto.gov/teas/eTEASpageD.htm. If notification of this Office action was received via e-mail, no response using this form may be filed for 72 hours after receipt of the notification. **Do not attempt to respond by e-mail as the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address

of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at http://tarr.uspto.gov. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

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ATTACHMENT 1

Shinnecock Indian Nation
An Ancient History and Culture

Since the beginning, Shinnecock time has been measured in moons and seasons, and the daily lives of our people revolved around the land and the waters surrounding it. Our earliest history was oral, passed down by word of mouth from generation to generation, and as far back as our collective memory can reach, we are an Algonquin people who have forever lived along the shores of Eastern Long Island.

Scientists say we came here on caribou hunts when the land was covered with ice. But our creation story says we were born here; that we are the human children of the goddess who descended from the sky. It was she, the story goes, who caused the land to form beneath her feet from the back of Great Turtle, deer to spring forth from her fingertips; bear to roar into awakening, wolf to prowl on the first hunt. It was she who filled the sky with birds, made the land to blossom and the ponds and bays to fill with fish and mollusks. And when all was done, the

Shinnecock, the People of the Shore, appeared in this lush terrain. We are still here.

As coastal dwellers, we continue to prize the bounty of the sea, the shellfish, the scaly fish, which for thousands of years provided the bulk of our diet. We were whalers, challenging the mighty Atlantic from our dugout canoes long before the arrival of the big ships, long before the whaling industry flourished in the 19th century.

In the 1700's, we became noted among the northeastern coastal tribes for our fine beads made from the Northern quahog clam and whelk shells. The Dutch, who arrived on our shores before the English, turned our beads (wampum) into the money system for the colonies.

The Shinnecock Nation is among the oldest self-governing tribes of Indians in the United States and has been a state-recognized tribe for over 200 years. In 1978, we applied for Federal Recognition, and in 2003, we were placed on the Bureau of Indian Affairs' "Ready for Active" list.

Traditionally, decisions concerning the welfare of the tribe were made by consensus of adult male members. Seeking to shortcut the consensus process in order to more easily facilitate the acquisition of Indian lands, the Town of Southampton devised a three member trustee system for the Shinnecock people. This system of tribal government was approved by the New York State legislature in February of 1792. Since April 3, 1792, Shinnecock Indians have gone to the Southampton Town Hall the first Tuesday after the first Monday in April to

elect three tribal members to serve a one- year term as Trustees. In April of 2007, the Shinnecock Indian Nation exercised its sovereign right as an ancient Indian Nation and returned to one of its basic Traditions: it bypassed the Southampton Town Hall and for the first time since 1792 held its leadership elections at home, where they will remain.

The Trustee system, however, did not then and does not now circumvent the consensus process, which still remains the governing process of the Shinnecock Indian Nation. Major decisions concerning the tribe are voted yea or nay by all eligible adult members, including women, who gained the right to vote in the mid-1990s. Also in that period, the Shinnecock Nation installed a Tribal Council, a 13 member body elected for two years terms. The Council is an advisory body to the Board of Trustees.

Today, we number over 1300 people, more than 600 of whom reside on the reservation adjacent to the Town of Southampton on the East End of Long Island. While our ancestral lands have dwindled over the centuries from a territory stretching at least from what is known today as the Town of Easthampton and westward to the eastern border of the Town of Brookhaven, we still hold on to approximately 1200 acres.

With modest resources, we have managed to build a community to help us better meet the demands of an ever expanding and intrusive world. In addition to the Shinnecock Presbyterian church building and its Manse, our infrastructure includes a tribal community center, a shellfish hatchery, a health and dental center, a family preservation and Indian

education center, a museum, and playgrounds for our children. Also on our list of recent achievements is the design and development of an official Shinnecock Indian Nation flag and an official seal.

Our skilled craftspeople and fine artists find employment within the Tribe as well as the surrounding area. The number of tribal members holding advanced degrees in law, business, medicine, social sciences and liberal arts continues to grow, and tribal members hold positions of responsibility in all areas, including teaching, banking and counseling, both within and outside the Shinnecock community.

One of the earliest forms of economic development that the Shinnecock Nation undertook was to lease Reservation acreage to local area farmers for their crops, mainly potatoes and corn. While the project did bring in a small income for the Tribe, the resulting damages from pesticides leaking into the ground water and polluting our drinking water supply were enormous. We had great expectations for our shellfish hatchery (The Shinnecock Shellfish Hatcheries and Environmental Center) but brown tide and general pollution forced it to close before it had the chance to develop into the business enterprise it was planned to be. In the summer of 2005, the Tribe began reseeding parts of its waterways with oysters, and celebrated a renewal harvest of Shinnecock chunkoo oysters at the Tribal Thanksgiving Dinner, November 2006.

At the present moment, the Shinnecock annual Powwow is the economic development project of record for the Shinnecock Nation. Revived in 1946 as

a benefit for our church, the Powwow has evolved into an event that hosts thousands of visitors. But we are at the mercy of the weather. For the past two years, rainstorms have forced us to drastically revise our budgeting plans. We are now exploring Indian Gaming as a means of attaining the much needed self-sufficiency that will enable us to perform the sacred duties laid out for us by the Ancestors — to protect, manage and maintain the Shinnecock Indian Nation.

By Bevy Deer Jensen

Shinnecock Nation Communications Officer

ATTACHMENT 2

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TRIBE MARKS ONE YEAR SINCE SMOKE-SHOP RAID

"WHAT HAPPENED JULY 14 WAS HORRIBLE," SAYS NARRAGANSETT CHIEF SACHEM MATTHEW THOMAS. "I'M ANGRY THAT THE NARRAGANSETT NATION WAS DISRESPECTED."

08 38 AM EDT on Thursday, July 15, 2004
BY KATIE MULVANEY
Journal Staff Writer

CHARLESTOWN -- A year may have passed since the state police raid on the Narragansett Indians' smoke shop, but the pain remains, tribal leaders said yesterday.

"I don't think we'll be able to take that wound away. When your leader is taken to the ground, it cuts

deep," Chief Sachem Matthew Thomas said in a ceremony marking the one-year anniversary of the raid. "When something like that happens, it means someone looks at you as less, and we're not less."

Medicine man Lloyd Wilcox yesterday lit a ceremonial fire at the smoke shop site to recall the moment of the raid: 1:20 p.m. Narragansett leaders sprinkled tobacco onto the flames and invited members involved in the skirmish to join them in sending a prayer to the Creator.

"They are the ones who stood on the frontline," said Councilman Hiawatha Brown, who was arrested in the incident. "It's very important to protect tribal sovereignty."

The Narragansett tribe opened the shop on Route 2, on July 12, 2003. Two days later, Governor Carcieri ordered the state police to stop what officials claimed was the illegal sale of tax-free cigarettes.

A violent clash erupted that left eight people injured and eight tribal members arrested, including Thomas. Images of the confrontation played nationwide, drawing sharp criticism from Native American and civil rights groups.

About 200 tribal members and supporters gathered yesterday afternoon in front of the Narragansett Indian Health Center, where more than 1,000 people rallied on behalf of the Narragansetts three days after the raid. The crowd -- which included a busload of West Warwick residents -- feasted on hot dogs, iced tea, sodas and cookies as speakers took the

stage and others participated in ceremonial dance and drumming.

"My mother taught me to tuck my kids in . . . and if anything happens, to call the police," Councilwoman Bella Noka told those gathered. On July 14, she said, "it was the police who knocked down my kids, my husband, my chief."

"That day, it weighs heavy in my heart," said Noka, who was arrested in the raid along with her husband and two children.

Tribal leaders called for unity against a common opponent -- states bearing down on tribes struggling to gain economic independence.

"This brings Indian nations together to understand we all have the same fight . . . It's not just Rhode Island," said Lance Gumbs, chairman of the Shinnecock tribe, one of at least seven Northeast tribes to be represented. "This aggressive attitude comes to the surface as Indian tribes try to make themselves self-sufficient. We call it the new genocide -- keep us economically insufficient and you'll be able to control us."

The Shinnecocks operate nine smoke shops on Long Island, but are battling New York State in court for the right to open a casino.

Narragansett medicine man Wilcox blasted the governor for what he viewed as his hypocritical stance on gambling and his opposition to the tribe's proposed West Warwick casino.

Early this month, Governor Carcieri vetoed legislation that would have put Harrah's casino proposal before voters in November. Harrah's has promised to give the tribe a share in the revenue.

"Guess what, guess who wants their hands on the purse strings," Wilcox said.

Lawmakers expect to return to the State House in the coming weeks to override the veto.

The tribe opened the smoke shop last year after Carcieri and the General Assembly failed to approve holding a referendum on the casino question. A day later, state and tribal representatives met to discuss the shop, but those talks broke down over the casino issue.

Tribal leaders refused to close the shop, and left the meeting assuming that the next day would be spent in court, Thomas said.

"What happened July 14 was horrible," the chief said. "I'm angry that the Narragansett nation was disrespected."

First Councilman Randy Noka yesterday disputed any suggestion that the tribe had opened the smoke shop as a ploy to gain public sympathy. The tribe needed the income, and tobacco sales represented the second-largest moneymaker for tribes behind casinos, he said.

"Never, ever did we foresee the state troopers coming in 30 strong," said Noka, who was among those arrested.

U.S. District Judge William E. Smith ruled in December that the tribe did not have the right to operate the tax-free smoke shop on its Charlestown lands. The tribe has challenged that decision in the 1st U.S. Circuit Court of Appeals, arguing that as a sovereign nation the tribe is outside the state's taxing authority. Arguments are set for September.

The state agreed to hold off on the prosecution of tribal members until that appeal has been resolved.

The governor's office issued a statement yesterday saying that although "we completely disagree on the merits of establishing a full-fledged casino in Rhode Island," it would continue to work to forge "a climate of mutual respect and collaboration" with the tribe.

ATTACHMENT 3

Everything for People Concerned About Smoking & Nonsmokers' Rights FIRST on the Internet for Smoking News and Documents

Action on Smoking and Health A National Legal-Action Antismoking Organization Entirely Supported by Tax-Deductible Contributions

NY - Indian Smoke Shops Doing Brisk Business - No Sales Tax [03/13-6]

Excerpts from **Cigarette business is booming _ legally _ at tax-free N.Y. Indian reservation**

By Robert Gearty, Daily News (NY) [03/11/00]

NEW YORK --There are other ways to save money on cigarettes than buying them illegally from a smuggler.

One of them is to drive out to the Shinnecock Indian Reservation in Southampton, where cigarettes cost about $3 a pack and $28.50 a carton. They're tax-free and legal.

Off the reservation, cigarettes on Long Island go for as much as $5 a pack and $41 a carton.

On his way to make a cigarette purchase, Joseph Sgroi, 46, said he didn't mind driving more than an hour from his home in Long Beach, to the reservation to buy three cartons.

"You can't beat the prices," he said.

As a result of last week's big jump in the state tax on cigarettes, more smokers like Sgroi are flocking to the reservation's three Montauk Highway smoke shops.

The Shinnecock Nation is one of nine tribes in New York state with Indian sovereignty. As such, state tax laws aren't enforceable on their land.

Of the three reservation smoke stores, the Smoke Shop _ a ramshackle building with a dirt parking lot and two walkup windows _ is the busiest.

All major cigarette brands are available. But with a limited amount of storage space, there is enough room for only 60 cartons of each brand.

That discourages big purchases, as does a sign at the window limiting the number of cartons one person can buy to 30.

Still, sales are brisk as regular customers and newcomers pull up in their cars. For those who can't make the trip, there's mail order.

Presented as a public service by Action on Smoking and Health (ASH), 2013 H Street, N.W., Wash., DC 20006, USA, (202) 659-4310. ASH is a 31-year-old national legal-action antismoking and nonsmokers' rights organization which is entirely supported by tax-deductible contributions. Please credit ASH, and include ASH's web address: http://ash.org

ATTACHMENT 4

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

ENTRY INTO FORCE: 4 January 1969, in accordance with article 19.1

REGISTRATION: 12 March 1969, No. 9464.

TEXT: United Nations, *Treaty Series* , vol. 660, p. 195.

STATUS: Signatories: 85. Parties: 173.

NOTE: The Convention was adopted by the General Assembly of the United Nations in resolution 2106 (XX)2 of 21 December 1965.

Declarations and Reservations

(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession. For objections thereto and declarations recognizing the competence of the Committee on the Elimination of Racial Discrimination, see hereinafter.)

AFGHANISTAN

Reservation:
While acceding to the International Convention on the Elimination of All Forms of Racial Discrimination, the Democratic Republic of Afghanistan does not consider itself bound by the provisions of article 22 of the Convention since according to this article, in the event of disagreement between two or several States Parties to the Convention on the interpretation and implementation of provisions of the Convention, the matters could be referred to the International Court of Justice upon the request of only one side.

The Democratic Republic of Afghanistan, therefore, states that should any disagreement emerge on the interpretation and implementation of the Convention, the matter will be referred to the International Court of Justice only if all concerned parties agree with that procedure.

Declaration:

Furthermore, the Democratic Republic of Afghanistan states that the provisions of articles 17 and 18 of the International Convention on the Elimination of All Forms of Racial Discrimination have a discriminatory nature against some states and therefore are not in conformity with the principle of universality of international treaties.

ANTIGUA AND BARBUDA

Declaration:
"The Constitution of Antigua and Barbuda entrenches and guarantees to every person in Antigua and Barbuda the fundamental rights and freedoms of the individual irrespective of race or place of origin. The Constitution prescribes judicial processes to be observed in the event of the violation of any of these rights, whether by the state or

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Upon signature:

Subject to the following reservation and interpretative statements:

"First, in the present circumstances deriving from the usurpation of power in Rhodesia by the illegal régime, the United Kingdom must sign subject to a reservation of the right not to apply the Convention to Rhodesia unless and until the United Kingdom informs the Secretary-General of the United Nations that it is in a position to ensure that the obligations imposed by the Convention in respect of that territory can be fully implemented.

"Secondly, the United Kingdom wishes to state its under- standing of certain articles in the Convention. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4. Further, the United Kingdom interprets the requirement in article 6 concerning `reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available and interprets `satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end. In addition it interprets article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention.

"Lastly, the United Kingdom maintains its position in regard to article 15. In its view this article is discriminatory in that it establishes a procedure for the receipt of petitions relating to dependent territories while making no comparable provision for States without such territories. Moreover, the article purports to establish a procedure applicable to the dependent territories of States whether or not those States have become parties to the Convention. Her

Majesty's Government have decided that the United Kingdom should sign the Convention, these objections notwithstanding, because of the importance they attach to the Convention as a whole."

Upon ratification:
"First, the reservation and interpretative statements made by the United Kingdom at the time of signature of the Convention are maintained.

"Secondly, the United Kingdom does not regard the Commonwealth Immigrants Acts, 1962 and 1968, or their application, as involving any racial discrimination within the meaning of paragraph 1 of article 1, or any other provision of the Convention, and fully reserves its right to continue to apply those Acts.

"Lastly, to the extent if any, that any law relating to election in Fiji may not fulfil the obligations referred to in article 5 (c), that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5 (d) (v), or that the school system of Fiji may not fulfil the obligations referred to in articles 2, 3 or 5 (e) (v), the United Kingdom reserves the right not to apply the Convention to Fiji."

UNITED STATES OF AMERICA

Upon signature:
"The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America."

Upon ratification:
"I. The Senate's advice and consent is subject to the following reservations:

(1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association.

Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

(2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of nongovernmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of

`public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except asmandated by the Constitution and laws of the United States. (3) That with reference to article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

II. The Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention:

That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention.

III. The Senate's advice and consent is subject to the following declaration:

That the United States declares that the provisions of the Convention are not self-executing."

VIETNAM

Declaration:
(1) The Government of the Socialist Republic of Viet Nam declares that the provisions of article 17 (1) and of article 18 (1) of the Convention whereby a number of States are deprived of the opportunity of becoming Parties to the said Convention are of a discriminatory nature and it considers that, in accordance with the principle of the sovereign equality of States, the Convention should be open to participation by all States without discrimination or restriction of any kind.

Reservation:
(2) The Government of the Socialist Republic of Viet Nam does not consider itself bound by the provisions of article 22 of the Convention and holds that, for any dispute with regard to the interpretation or application of the Convention to be brought before the International Court of Justice, the consent of all parties to the dispute is necessary. *(The reservation was circulated by the Secretary-General on 10 August 1982.)*

YEMEN

"The accession of the People's Democratic Republic of Yemen to this Convention shall in no way signify recognition of Israel or entry into a relationship with

it regarding any matter regulated by the said Convention. "The People's Democratic Republic of Yemen does not consider itself bound by the provisions of Article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision, and states that, in each individual case, the consent of all parties to such a dispute is necessary for referral of the dispute to the International Court of Justice.

"The People's Democratic Republic of Yemen states that the provisions of Article 17, paragraph 1, and Article 18, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination whereby a number of States are deprived of the opportunity to become Parties to the Convention is of a discriminatory nature, and holds that, in accordance with the principle of the sovereign equality of States, the Convention should be opened to participation by all interested States without discrimination or restriction of any kind."

Declarations recognizing the competence of the Committee on the Elimination of Racial Discrimination ***in accordance with article 14 of the Convention***

ALGERIA

12 September 1989

The Algerian Government declares, pursuant to article 14 of the Convention, that it recognizes the competence of the Commit tee to receive and consider communications from

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3 December 1982

In accordance with [article 14], the Government of Senegal declares that it recognizes the competence of the Committee (on the Elimination of Racial Discrimination) to receive and consider communications from individuals within its jurisdiction claiming to be victims of a violation by Senegal of any of the rights set forth in the convention on the Elimination of All Forms of Racial Discrimination.

SLOVAKIA

17 March 1995

The Slovak Republic, pursuant to article 14 of the Convention, recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation of any of the rights set forth in the Convention.

SPAIN

13 January 1998

[The Government of Spain] recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Spain claiming to be victims of violations by the Spanish State of any of the rights set forth in that Convention.

Such competence shall be accepted only after appeals to national jurisdiction bodies have been exhausted, and it must be exercised within three months following the date of the final judicial decision.

SWEDEN

"Sweden recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Sweden claiming to be victims of a violation by Sweden of any of the rights set forth in the Convention, with the reservation that the Committee shall not consider any communication from an individual or a group of individuals unless the Committee has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

UKRAINE

28 July 1992

In accordance with the article 14 of the International Convention on the Elimination of All forms of Racial Discrimination, Ukraine declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals [within its jurisdiction] claiming to be victims of a violation by [it] of any of the rights set forth in the Convention.

URUGUAY

11 September 1972

The Government of Uruguay recognizes the competence of the Committee on the Elimination of Racial Discrimination, under article 14 of the Convention.

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Office of the United Nations High Commissioner for Human Rights Geneva, Switzerland

The New York Times

Metro Matters; An End Run Around Tax On Cigarettes

By JOYCE PURNICK

Published: Monday, January 3, 2000

DOCTORS and scientists are thrilled with New York's new tax on cigarettes, and with good reason. Once the higher tax kicks in, cigarettes in New York will be more expensive than anywhere else in the country. The price will inevitably turn some smokers into nonsmokers and deter many young people from ever picking up one of those noxious weeds. But the medical community and lawmakers who approved the new tax aren't the only ones cheering.

So is Larry Ballagh, proprietor of a smoke shop on an Indian reservation in Irving, near Buffalo. Customers at his shop do not pay taxes, so the State Legislature has made him one happy fellow. "God bless them," said Mr. Ballagh, a member of the Seneca nation. "Every time they do it, more people come," he said, referring to the Legislature's decision to raise the tax. "I guess there is some indication that an increase in prices does encourage a certain number of people to quit, which may be a good thing. But New York State taxes make our product more attractive."

It would seem so. The folks at the Shinnecock Smoke Shop in Southampton recently bought a full-page ad in The New York Post illustrated with an Indian in feathered headdress. And the Web is crowded with

cigarette come-ons. Just one site -- webmaster@discount-cigarettes.org/ -- lists screen after screen of vendors, from BigIndian.com to SmokemCheap.com.

All, from the small mom-and-pop operation to the established business enterprise, undersell traditional stores by at least $10, selling top brands for $22.35 to $24.99 a carton (plus $1.50 for shipping).

One regular customer of an Indian smoke store in Shirley, Long Island, where several smoke shops dot suburban streets, stocks up every month. "It's a big saving," he said. "Why not?"

Non-Indians are supposed to pay state and local taxes in reservation shops, but they do not, and now the Internet brings the tax-free benefits of reservation shopping to smokers without cars.

With the tax soon almost doubling to $1.11 a pack, cigarettes will cost more in New York than anywhere else in the country: about $4 a pack and $42 a carton in New York City. The incentive to find bargains will be greater than ever -- as will the incentive to provide those bargains.

Hence a few troubling predictions along with the happy ones about declines in smoking: that the higher price will energize Internet, mail order and reservation sales, as well as the already healthy black market in cigarettes smuggled in from other states. People with conventional stores in Binghamton and other towns near Pennsylvania,

where the taxes are lower, worry about losing customers.

Nobody keeps reliable statistics, but estimates are that tax-free sales online and in reservation shops now account for a very small percentage of cigarette sales. The same for the black market. But there are signs of growth.

According to the Federal Bureau of Alcohol, Tobacco and Firearms, states with the highest cigarette taxes in 1998 were losing $100 million a year in potential tax revenues to smuggling. After Maryland raised its tax last year to 66 cents a pack from 36 cents, state authorities said that in three months, they made more arrests for cigarette smuggling (nine) than in the entire previous year (five). In previous years, when New York raised taxes much higher than neighboring states, truckloads of cigarettes were smuggled in from states with lower taxes.

THE new tax is to help to finance health care coverage for up to one million uninsured New Yorkers. If too many sales go untaxed, then what?

"Good things are going to happen for the uninsured, but we are concerned about uncollected taxes," said John McCardle, a spokesman for the Republican majority in the State Senate. "It's a mixed bag."

Joseph Conway, spokesman for Gov. George E. Pataki's budget division, said that the budget office considered uncollected taxes and potential declines in smoking in its calculations. He said details would

have to wait until the governor's budget presentation later this month.

Dr. K. Michael Cummings, with the State Department of Health's Roswell Park Cancer Institute in Buffalo, said what matters is that cigarette smoking will decline. "Yes, there are people who will buy on the Internet and on Indian reservations, but a big proportion? No. Will the tax have a deterrent effect on cigarette smoking? Yes."

Cigarette sales declined elsewhere when taxes went up. Nobody can say with certainty, though, whether those figures represented fewer smokers, or more enterprising shoppers.

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A suggested letter would read:

Dear (Representative),

I am writing you to urge you to vote against a bill currently pending in the House Of Representatives, HR 2824.

This bill, once again, singles out smokers like me and imposes what are clearly unconstitutional restrictions on my freedom as a consumer to purchase legal products in the same way I can purchase any other legal product.

For too long we smokers have allowed the government to impose clearly unfair legal burdens on us. I, for one, am tired of it, and intend to watch how you vote, so I can vote accordingly.

Sincerely,
(Your name here)

ACTION ALERT # 4

New York Indian Tribes Rally to Support Native Businesses

MASTIC, N.Y., June 15 /PRNewswire/ -- The Native American Business Alliance of Long Island today caravanned from the Unkechaug Powwow Grounds (Mastic, N.Y.) to the **Shinnecock** territory (Southampton, N.Y.) to support its new grassroots effort to protect Indian Nations' right to sell tax-free tobacco products.

"The faces you see here today are the faces of those who depend on Native American Businesses," Unkechaug tribal chief Harry Wallace said. "Without our treaty-mandated right to sell tax-free tobacco, these businesses -- these people -- will suffer. That is why we are here today -- to defend our rights and to defend our economic independence."

Members of Tuscarora, Seneca, Onondaga, Oneida, Cayuga, Mohawk, Pequot, Narragansett and other Nations, along with friends, neighbors and business colleagues of the Tribes, rallied against the politicians and wealthy special interest groups that have passed legislation and filed lawsuits that threaten to terminate centuries-old treaties protecting the right of New York Tribes to sell tax-free tobacco and other goods on their own territories. With over 5,000 supporters thus far, the Alliance is demanding that new legislation be enacted to rescind this unjust act. The Alliance is also urging

New York citizens to call upon the convenience stores and big chain supermarkets, asking them to drop their lawsuits against these small Indian smoke shops.

Following the rally, supporters toured a Shinnecock-owned small business, "Raindrop's Quick Stop" on Montauk Highway.

"The politicians in Albany need to visit native businesses like these so they can see that executing this legislation will cripple the economy of New York Tribes," said Rebecca Genia, of the Shinnecock Nation. "Taking away the rights laid out in these long-standing treaties would take away many people's livelihood."

Income from Indian smoke shops helps Tribes pay their own way, using some of the profits to fix schools, churches, playgrounds and housing on reservations. They also employ hundreds of tribal members with full healthcare and retirement benefits and generate economic activity for local, non-Indian businesses that supply their stores.

New Yorkers can join the Alliance by going to http://www.supportnativebusiness.com, where they can sign a petition, write directly to state officials, and get additional information.

The Native American Business Alliance of Long Island represents the Nations and the Indian-owned stores of the Unkechaug and Shinnecock Nations. We have formed this coalition because without help from our friends, neighbors and business colleagues,

these stores will be shut down -- ending a vital source of economic activity.

ACTION ALERT # 5

$2 FEDERAL CIGARETTE TAX HIKE SOUGHT

Though the article below [$2 Federal Cigarette Tax Hike Sought] includes the ray of sunshine that President Bush supports tax cuts, not tax hikes, it is still a good idea to let our leaders know that enough is enough.

State taxes on **cigarettes** are intended to be used to cover health care costs related to smoking and prevention. They're not. The settlement between the tobacco industry and the 46 states, at $246 billion, was intended to cover the same. It's not. So they want to raise the federal tax by $2 to cover what was already supposed to be covered?

Most abhorrent is the sanctimonious belief that they hold some right to force adults to stop using a legal product via financial persecution. If special interest groups and all around busybodies can get away with using this method to control one particular behavior deemed a "health risk" what is to stop the next group from trying to control other "risky" behavior using the same methods?

This article reports: "Anti-tobacco activists said the report is a powerful tool for pressuring the Bush administration and Congress."

Time to add our own pressure against such social engineering. **Write your U.S. Senators, House Representatives and President Bush.** Go to

Congress.org for all the contact information you'll need at your fingertips.

SIGN OUR PETITIONS

http://www.PetitionOnline.com/nofedtax/petition.html http://www.ipetitions.com/campaigns/no_fed_tax

SUPERPAGES.COM

Southampton, NY Attraction

Shinnecock Indian Outpost

Old Montauk Hwy
Southampton, NY 11968
(631) 283-8047
Interactive Map
Driving Directions

This funky shop sells tax-free **cigarettes**, American Indian crafts, clothes, and glassware. The prices are reasonable, and you can do your browsing and shopping quite early in the morning, should you wish to avoid too many crowds. There also is a deli, where you can get your morning coffee and bagel. The Outpost makes for a quick and easy stop before you begin your day of sightseeing. (Summer, Monday-Sunday 6:30 am-7 pm to 6 pm rest of year)

INDIAN COUNTRY TODAY

Tax ruling could affirm sovereignty

By Gale Courey Toensing / Indian Country Today

Story Published: Mar 9, 2007

Story Updated: Sep 10, 2008

NEW YORK - In a turnaround from previous promises - or threats - to collect state taxes on tribal cigarette sales, the New York state attorney general;s office is seeking a declaratory judgment verifying that tribal nations and the distributors who sell them cigarettes are exempt from paying tobacco excise taxes.

The ruling, if granted, could be a de facto affirmation of tribal sovereignty and immunity; but tribal leaders expressed wariness in their response to the legal action - perhaps understandably, since the state's motion is not necessarily

motivated by a pure intention to support Indian sovereignty and immunity, but appears to be a tactic driven by the desire to avoid further lawsuits from the big tobacco companies.

A positive ruling could put to rest years of struggles between the tribes and state for tax sovereignty, and reaffirm previous court decisions. The tribes have steadily upheld their position of tribal sovereignty and immunity concerning trade on their lands, while state officials on a pendulum swing have vacillated between the somewhat sympathetic - or laissez faire

- attitude of former Gov. George Pataki to the hot-and-cold running position of Gov. Eliot Spitzer, who ratcheted up the pressure on reservation cigarette sales before last year's November elections, but later moderated his stance.

Andrew Cuomo, the new state attorney general, filed the motion for a declaratory judgment Feb. 5 in state Supreme Court in New York City. The motion, written by Assistant Attorney General Louis Willenken, names three categories of defendants: Philip Morris and more than 50 other big tobacco companies that signed the $246 billion tobacco Master Settlement Agreement of 1998; more than two dozen tobacco companies and distributors, such as Smokin' Joe and the Native Wholesale Supply Co., which did not sign the MSA; and the Cayuga, Oneida, Onondaga, Seneca, St. Regis Mohawk, Tonawanda Band of Senecas, Tuscarora, **Shinnecock** and Unkechaug tribal nations.

As background, Philip Morris and the other signatories to the tobacco settlement, known as the PM defendants, or participating manufacturers, are required by the state's Public Health Law that implemented the MSA to pay millions of dollars each year to the state government.

Companies that sell **cigarettes** in New York but didn't sign the MSA are known as the NPM, or nonparticipating manufacturers. The companies are required to make annual escrow deposits of funds, based on the "units sold" - the number of individual **cigarettes** - in the state on which the state collects taxes in case a future court ruling requires these

companies have to make MSA-like payments to offset smoking-related illnesses.

The NPM companies are not required to pay taxes or set aide escrow funds on the **cigarettes** they sell to tribal nations.

The American Indian defendants are those with tribal lands in New York state, which "has a policy of recognizing the sovereignty of Native American Defendants that existed prior to the passage" of the state Public Health Law, the motion says. The state also has a "long history of taking the position that it is improper for the State of New York to place any burden [tax, escrow or otherwise] on the sale of **cigarettes** by Native Americans," the motion says.

But Philip Morris and the other big PM tobacco companies are now going after the state for not requiring the NPM companies to put money into escrow on the **cigarettes** they sell to the nations.

"PM defendants have advised New York that they take the position that New York does not properly enforce [the Public Health Law] because New York does not require escrow deposits on PM cigarette sales on Native American lands," the motion says.

The attorney general disagrees. If Philip Morris and the other big tobacco companies are correct, the motion says, it would increase both the cost and price of the **cigarettes** NPM defendants sell to the tribes and those sold on tribal lands.

"In addition, the correct interpretation of [the] Public Health Law impacts on the relationship between the

State of New York and Native American Tribes in New York," the motion says.

Both the attorney general's office and Philip Morris declined to comment on the pending legal action.

Chief Harry Wallace of the Unkechaug Indian Nation of Poospatuck Indians questioned the purpose of the legal action:

"So, the attorney general, if you can believe this, looks like he's on our side, right? Obviously, there is a level of suspicion and disbelief when any government officials, especially attorneys general, argue that Indian nations are sovereign and not subject to taxes. You have to wonder why."

The obvious explanation, Wallace said, is that the state wants to avoid the not-so-veiled threat by Philip Morris of another protracted and expensive lawsuit.

"Philip Morris is angling not to pay or to renegotiate their terms under the MSA. They're using allegations of noncompliance by these nonparticipating wholesalers and manufacturers as leverage to reduce their commitment. The new CEO is a bean-counter. That's the obvious answer. The not-so-obvious answer is why would he [the attorney general] be so specific in reference to Indian tribes? Why would he seek this declaratory action? What does he hope to gain from it apart from avoiding another lawsuit?"

Joseph Crangle, a former Seneca attorney who has handled several of the state's lawsuits against the

tribe, said the motion for declaratory judgment is "certainly recognition of the state's lack of civil regulatory jurisdiction over activities on the Seneca and other reservations."

"Maybe it's the power of the Holy Spirit and they're wising up and understand they're not going to be successful in legal actions," he quipped.

A positive ruling on the request for declaratory judgment would reiterate the tribal sovereignty and immunity that is already established state law, Crangle said, citing a 1999 case filed by an association of convenience stores against the state to try to force the state tax on Indian sales of cigarettes.

"In his decision, and I'm quoting him directly, the judge said: 'Tribes possess substantial attributes of sovereignty. Indian tribes have immunity from suit and cannot be sued to accomplish tax collections. This immunity extends to tribal retailers.' You can't get anything stronger than that," Crangle said.

The decision withstood appeals all the way up to the U.S. Supreme Court, which denied the convenience store group's petition.

"So that is the law of New York state," Crangle said, and the request for declaratory motion, if granted, will reaffirm it.

Other tribes declined to comment, citing the pending litigation.

[ENTERED August 28, 2009]

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en bane having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED andit is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 4, 2009.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 08/28/2009

cc: Scott Michael Moore
Raymond T. Chen

IN RE SHINNECOCK SMOKE SHOP, 2009-1100
(PTO - 78918061; 78918500)

U.S. CONST. amend. V:

> No person shall ... be deprived of life, liberty, or property, without due process of law;

15 U.S.C. § 1052 (a):

> [No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it-]
>
> (a) Consists of or compromises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 2(9) of the Uruguay Round Agreements Act [19 USCS § 3501(9)] enters into force with respect to the United States. [emphasis added]

Document Description: **Offc Action Outgoing** Mail / Create Date: **07-Jul-2007**

To: SHINNECOCK SMOKE SHOP (smm@milopc.com)

Subject: TRADEMARK APPLICATION NO. 78918500 - SHINNECOCK BRAND

Sent: 7/7/2007 12:41:43 PM

Sent As: ECOM107@USPTO.GOV

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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/918500

MARK: SHINNECOCK BRAND LIG

78918500

CORRESPONDENT ADDRESS:

SCOTT MICHAEL MOORE, ESQ.
MOORE INTERNATIONAL LAW OFFICES, P.C.
45 ROCKEFELLER PLZ, STE 2000
NEW YORK, NY 10111-0100

RESPOND TO THIS ACTION:

http://www.uspto.gov/teas/eTEASpageD.htm

GENERAL TRADEMARK INFORMATION:

http://www.uspto.gov/main/trademarks.htm

APPLICANT: SHINNECOCK SMOKE SHOP

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

smm@milopc.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 7/7/2007

THIS IS A FINAL ACTION.

This is in response to the applicant's response filed on June 4, 2007 (hereinafter "Appl's Response").

$50 Fee Due – Response not Filed Via TEAS

The applicant must submit an additional application processing fee of $50 per class because the applicant has not complied with the requirement to file responses to Office actions via the Trademark Electronic Application System (TEAS). 37 C.F.R. §§2.6(a)(iv), 2.23(a)(1) and 2.23(b).

New Drawing, Legal Entity Information and Statement

The new drawing, amended legal entity and explanation of the wording "MADE UNDER SOVEREIGN AUTHORITY" are acceptable.

The refusal under Trademark Act Section 2(a), 15 U.S.C. §1052(a), is now made FINAL for the reasons set forth below. In addition, the following requirement is now made FINAL: acceptable color claim. 37 C.F.R. §2.64(a).

Final Refusal – False Connection

Registration is refused because the proposed mark consists of or comprises matter which may falsely suggest a connection with the Shinnecock Indian Nation of New York, a New York state recognized tribe. Although not connected with the goods the applicant provides under the proposed mark, the Shinnecock Indian Nation and its commercial enterprises is so famous that consumers would presume a connection. Trademark Act Section 2(a), 15 U.S.C. §1052(a); TMEP §§1203.03, 1203.03(e) and 1203.03(f); *See generally University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Nuclear Research Corp.*, 16 USPQ2d 1316 (TTAB 1990); *University of Alabama v. BAMA-Werke Curt Baumann*, 231 USPQ 408 (TTAB 1986); *In re Cotter & Co.*, 228 USPQ 202 (TTAB 1985); *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428 (TTAB 1985).

The following is required for a showing of false connection under Section 2(a):

- ☐ the mark sought to be registered is the same as or a close approximation of the name or identity of a person or institution;

- ☐ the mark would be recognized as such;

- ☐ the person or institution identified in the mark is not connected with the goods sold or services performed by the applicant under the mark; and

- ☐ the fame or reputation of the named person or institution is of such a nature

> that a connection with such person or institution would be presumed when the applicant's mark is used on its goods or services.

In re Nuclear Research Corp., 16 USPQ2d 1316 (TTAB 1990); *In re Cotter & Co.*, 228 USPQ 202, 204 (TTAB 1985); *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428, 429 (TTAB 1985).

"Shinnecock" identifies an Indian tribe located in Southampton, New York. See attached evidence from the tribe's official website, located at http://www.shinnecocknation.com/history.asp. Printouts of articles downloaded from the Internet are admissible as evidence of information available to the general public, and of the way in which a term is being used by the public. TMEP §710.01(b). *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1475-76 (TTAB 1999); *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370-1 (TTAB 1998).

Indian tribes have been determined to be juristic persons by the Trademark Trial and Appeal Board. See, e.g., *In re White*, 73 USPQ2d 1713 (TTAB 2004).

Consumers are likely to recognize that the term "Shinnecock" describes the tribe. The Shinnecocks operate nine smoke shops on Long Island. See attached evidence from "*Tribe Marks One Year Since Smoke-Shop Raid*" (Providence Journal 7/15/2004), located at http://www.shinnecocknation.com/news/news112.asp The tribe allows the operation of three smoke shops that sell tax-free cigarettes on tribal lands. See attached evidence from *Indian Smoke Shops Doing*

Brisk Business - No Sales Tax [03/13-6], located at http://www.no-smoking.org/march00/03-13-00-6.html. Consumers of cigarettes are likely to be aware that cigarettes are manufactured and/or sold on numerous Indian reservations. See, e.g., evidence attached to first Office action from www.blackhawktobacco.com and www.smokenatives.com.

The Shinnecock Indian Nation is not the applicant, thus, the applicant's proposed mark falsely suggests a connection with the tribe. Although the application indicates that the applicant's proprietor is an on-reservation member of the Shinnecock Indian Nation, there is nothing in the record to show that the tribe has granted the applicant the right to use the tribal name. As the Trademark Trial and Appeal Board recently noted in *In re White*, *supra*, "the key is whether the name per se is unmistakably associated with a particular person or institution and, *as used* would point uniquely to the person or institution. In short, it is the combination of (1) the name of sufficient fame or reputation and (2) its use on or in connection with particular goods or services, that would point consumers of the goods or services uniquely to a particular person or Institution." *White*, 73 USPQ2d at 1721 (affirming refusal of an application filed by an individual member of the St. Regis Band of Mohawk Indians for the mark "APACHE" for cigarettes) (emphasis in original).

Use of the name "SHINNECOCK" on or in connection with cigarettes would point consumers of the cigarettes uniquely to the Shinnecock Indian Nation. The Shinnecocks are well-known in

connection with cigarettes (see attached excerpts from articles in *The New York Times* located at:

http://216.239.51.104/search?q=cache:s8dVC0mpR_sJ:topics.nytimes.com/top/reference/timestopics/subjects/i/indians_american/index.html%3Fquery%3DSHINNECOCK%2520INDIANS%26field%3Ddes%26match%3Dexact+Shinnecock+cigarettes&hl=en&ct=clnk&cd=4&gl=us and http://216.239.51.104/search?q=cache:tA-LG0qL5hcJ:www.discount-cigarettes.org/nytimes.html+Shinnecock+cigarettes&hl=en&ct=clnk&cd=1&gl=us;

the attached "action alert" press release located at http://216.239.51.104/search?q=cache:La07UEodZkMJ:www.nycclash.com/alerts.html+Shinnecock+cigarettes&hl=en&ct=clnk&cd=15&gl=us;

the attached "superpages" ad located at http://216.239.51.104/search?q=cache:s1DGVULqQlYJ:www.superpages.com/cities/mtg/94742/+Shinnecock+cigarettes&hl=en&ct=clnk&cd=26&gl=us);

and the attached *Indian Country Today* article located at http://216.239.51.104/search?q=cache:c_Nh3ZEF7vIJ:www.indiancountry.com/content.cfm%3Fid%3D1096414632+Shinnecock+cigarettes&hl=en&ct=clnk&cd=30&gl=us).

The Shinnecock Indian Nation is a Person Under the Trademark Act

The applicant argues that "The Shinnecock Indian Nation is not a natural person. Therefore, section

1052(a) cannot be used to refuse registration on the basis of a false connection" (Appl's Response at 4), and that "The Shinnecock Indian Nation is not a "person" for the reason that the Shinnecock Indian Nation is a sovereign governmental entity with jurisdiction over the Shinnecock Indian Reservation." (Appl's Response at 4).

This argument is without merit. The United States is considered a person for purposes of the Trademark Act.

> The term "person" and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this Act includes a juristic person as well as a natural person. The term "juristic person" includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law.
>
> The term "person" also includes the United States, any agency or instrumentality thereof, or any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States. The United States, any agency or instrumentality thereof, and any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States, shall be subject to the provisions of this Act in the same manner and to

> the same extent as any nongovernmental entity.

Trademark Act §45; 15 USC §1127.

Likewise, Indian tribes have been determined to be juristic persons by the TTAB. *In re Julie White*, 73 USPQ2d 1713 (TTAB 2004). The applicant's argument that the Shinnecock Indian Nation has been recognized as an Indian tribe by the State of New York and by the federal courts under federal common law seems only to support the trademark examining attorney's position that the tribe is a person or institution for purposes of the Trademark Act and to bolster the trademark examining attorney's arguments that the Shinnecock are a well-known tribe.

Due Process Argument Does Not Apply

The applicant's second argument is that the USPTO's denial of registration is a violation of the due process clause of the Fifth Amendment to the United States Constitution because the denial is based on the applicant's Indian status and that other marks have been allowed to register.

The controlling precedent on this issue is clear and forecloses this challenge. A similar due process claim was made in *In re The Boulevard Entertainment, Inc.*, 334 F.3d 1336 (Fed. Cir. 2003); the constitutional arguments failed.

Furthermore, the TTAB is an administrative tribunal and accordingly has no authority to make findings regarding constitutional claims. *See* TBMP

§102.01 (2d ed. rev. 2004), and the authorities cited therein.

Decisions by Past Examiners

The issuance of some registrations with tribal names to non-Indians does not establish racial discrimination. The applicant has merely recited third-party registrations, without regard for the goods and/or services recited therein. As explained in *In re White*, the test for finding a false connection looks at the *combination* of a name of sufficient fame or reputation *and its use on or in connection with particular goods or services*. *White*, 73 USPQ2d at 1721 (emphasis added).

Moreover, the TTAB has consistently disagreed that the USPTO must take a similar or identical action in a current case as it did in an action from the past even if either the past action or the current action was and/or is erroneous under the law. As stated by the Commissioner in *In re Stenographic Machines, Inc.*, 199 USPQ 313, 317 (Comm. 1979): "Consistency of Office practice must be secondary to correctness of Office practice. The present case must be determined on the basis of the facts presented." While uniform treatment under the Trademark Act is highly desirable, the statutory duty under the Trademark Act is to determine, based upon the record, whether the applicant's mark is registrable. The determination of registrability of a particular mark by a prior trademark examining attorney cannot control the merits of a current case. *See McDonald's Corp. v. McClain*, 37 USPQ2d 1274 (TTAB 1995); *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994). Neither the TTAB nor any court is

bound by prior decisions of trademark examining attorneys, and each case must be decided on its own merits, on the basis of the record therein. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). *See also In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001).

Highlighting inconsistency by the Office in various contexts does not establish any improper motive behind the inconsistency. A similar constitutional argument was made in *In re The Boulevard Entertainment, Inc.*, 334 F.3d 1336 (Fed. Cir. 2003). In denying the due process claim, the Federal Circuit stated:

> The fact that, whether because of administrative error or otherwise, some marks have been registered even though they may be in violation of the governing statutory standard does not mean that the agency must forgo applying that standard in all other cases. The TTAB's decision in this case therefore does not violate the constitutional principles that Boulevard invokes.

Boulevard Entertainment, 334 F.3d at 1343.

International Treaty Argument Does Not Apply

Finally, the applicant asserts that the refusal to register violates the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination. Regarding the applicant's treaty claim, the applicant cannot relay on the

treaty because it is not self-executing (see attached evidence from http://www.hri.ca/fortherecord1997/documentation/reservations/ccrd.htm). Thus, the applicant cannot claim a private right of action based on the treaty. *See, e.g., In re Rath* (402 F.3d 1207) (Fed. Cir. 2005) (the Paris Convention is not "self executing" and thus cannot override the statutory prohibition against registering surnames that have not acquired distinctiveness).

In conclusion: given that the applicant is not the Shinnecock Indian Nation, use of the proposed mark on cigarettes falsely suggests a connection with the tribe. Therefore, the refusal to register under Section 2(a) of the Trademark Act is made final.

Final Refusal – Acceptable Color Claim Required

The requirement for an acceptable color claim likewise is made final. The amended color claim is unacceptable because it merely lists colors, without including any color claim language. Therefore, the applicant must amend the color claim, referencing all the colors appearing in the drawing of the mark. 37 C.F.R. §2.52(b)(1); TMEP §807.07(a)(ii). The following color claim is suggested: "The colors red, green, yellow, brown, blue, black, white and pink are claimed as a feature of the mark."

Response Guidelines

If the applicant fails to respond to this final action within six months of the mailing date, the application will be abandoned. 15 U.S.C. §1062(b);

37 C.F.R. §2.65(a). The applicant may respond to this final action by:

(1) submitting a response that fully satisfies all outstanding requirements, if feasible (37 C.F.R. § 2.64(a)); and/or

(2) filing an appeal to the Trademark Trial and Appeal Board, with an appeal fee of $100 per class (37 C.F.R. §§2.6(a)(18) and 2.64(a); TMEP §§715.01 and 1501 *et seq.*; TBMP Chapter 1200).

In certain circumstances, a petition to the Director may be filed to review a final action that is limited to procedural issues, pursuant to 37 C.F.R. §2.63(b)(2). 37 C.F.R. §2.64(a). *See* 37 C.F.R. §2.146(b), TMEP §1704, and TBMP Chapter 1201.05 for an explanation of petitionable matters. The petition fee is $100. 37 C.F.R. §2.6(a)(15).

Note – TEAS Plus Applicants

TEAS PLUS APPLICANTS MUST SUBMIT DOCUMENTS ELECTRONICALLY OR SUBMIT FEE: TEAS Plus applicants should submit the following documents using the Trademark Electronic Application System (TEAS) at http://www.uspto.gov/teas/index.html: (1) written responses to Office actions; (2) preliminary amendments; (3) changes of correspondence address; (4) changes of owner's address; (5) appointments and revocations of attorney; (6) amendments to allege use; (7) statements of use; (8) requests for extension of time to file a statement of use, and (9) requests to delete a §1(b) basis. If any of these documents are

filed on paper, they must be accompanied by a $50 per class fee. 37 C.F.R. §§2.6(a)(1)(iv) and 2.23(a)(i). Telephone responses will not incur an additional fee. NOTE: In addition to the above, applicant must also continue to accept correspondence from the Office via e-mail throughout the examination process in order to avoid the additional fee. 37 C.F.R. §2.23(a)(2).

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.

/Kathleen de Jonge/
Examining Attorney, Law Office 107
(571) 272-9152
(571) 273-9107 (fax)

RESPOND TO THIS ACTION: If there are any questions about the Office action, please contact the assigned examining attorney. A response to this Office Action should be filed using the Office's Response to Office action form available at http://www.uspto.gov/teas/eTEASpageD.htm. If notification of this Office action was received via e-mail, no response using this form may be filed for 72 hours after receipt of the notification. **Do not attempt to respond by e-mail as the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the

following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at http://tarr.uspto.gov. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

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ATTACHMENT 1

Shinnecock Indian Nation
An Ancient History and Culture

Since the beginning, Shinnecock time has been measured in moons and seasons, and the daily lives of our people revolved around the land and the waters surrounding it. Our earliest history was oral, passed down by word of mouth from generation to generation, and as far back as our collective memory can reach, we are an Algonquin people who have forever lived along the shores of Eastern Long Island.

Scientists say we came here on caribou hunts when the land was covered with ice. But our creation story says we were born here; that we are the human children of the goddess who descended from the sky. It was she, the story goes, who caused the land to form beneath her feet from the back of Great Turtle, deer to spring forth from her fingertips; bear to roar into awakening, wolf to prowl on the first hunt. It was she who filled the sky with birds, made the land to blossom and the ponds and bays to fill with fish

and mollusks. And when all was done, the Shinnecock, the People of the Shore, appeared in this lush terrain. We are still here.

As coastal dwellers, we continue to prize the bounty of the sea, the shellfish, the scaly fish, which for thousands of years provided the bulk of our diet. We were whalers, challenging the mighty Atlantic from our dugout canoes long before the arrival of the big ships, long before the whaling industry flourished in the 19th century.

In the 1700's, we became noted among the northeastern coastal tribes for our fine beads made from the Northern quahog clam and whelk shells. The Dutch, who arrived on our shores before the English, turned our beads (wampum) into the money system for the colonies.

The Shinnecock Nation is among the oldest self-governing tribes of Indians in the United States and has been a state-recognized tribe for over 200 years. In 1978, we applied for Federal Recognition, and in 2003, we were placed on the Bureau of Indian Affairs' "Ready for Active" list.

Traditionally, decisions concerning the welfare of the tribe were made by consensus of adult male members. Seeking to shortcut the consensus process in order to more easily facilitate the acquisition of Indian lands, the Town of Southampton devised a three member trustee system for the Shinnecock people. This system of tribal government was approved by the New York State legislature in February of 1792. Since April 3, 1792, Shinnecock Indians have gone to the Southampton Town Hall

the first Tuesday after the first Monday in April to elect three tribal members to serve a one- year term as Trustees. In April of 2007, the Shinnecock Indian Nation exercised its sovereign right as an ancient Indian Nation and returned to one of its basic Traditions: it bypassed the Southampton Town Hall and for the first time since 1792 held its leadership elections at home, where they will remain.

The Trustee system, however, did not then and does not now circumvent the consensus process, which still remains the governing process of the Shinnecock Indian Nation. Major decisions concerning the tribe are voted yea or nay by all eligible adult members, including women, who gained the right to vote in the mid-1990s. Also in that period, the Shinnecock Nation installed a Tribal Council, a 13 member body elected for two years terms. The Council is an advisory body to the Board of Trustees.

Today, we number over 1300 people, more than 600 of whom reside on the reservation adjacent to the Town of Southampton on the East End of Long Island. While our ancestral lands have dwindled over the centuries from a territory stretching at least from what is known today as the Town of Easthampton and westward to the eastern border of the Town of Brookhaven, we still hold on to approximately 1200 acres.

With modest resources, we have managed to build a community to help us better meet the demands of an ever expanding and intrusive world. In addition to the Shinnecock Presbyterian church building and its Manse, our infrastructure includes a tribal community center, a shellfish hatchery, a health and

dental center, a family preservation and Indian education center, a museum, and playgrounds for our children. Also on our list of recent achievements is the design and development of an official Shinnecock Indian Nation flag and an official seal.

Our skilled craftspeople and fine artists find employment within the Tribe as well as the surrounding area. The number of tribal members holding advanced degrees in law, business, medicine, social sciences and liberal arts continues to grow, and tribal members hold positions of responsibility in all areas, including teaching, banking and counseling, both within and outside the Shinnecock community.

One of the earliest forms of economic development that the Shinnecock Nation undertook was to lease Reservation acreage to local area farmers for their crops, mainly potatoes and corn. While the project did bring in a small income for the Tribe, the resulting damages from pesticides leaking into the ground water and polluting our drinking water supply were enormous. We had great expectations for our shellfish hatchery (The Shinnecock Shellfish Hatcheries and Environmental Center) but brown tide and general pollution forced it to close before it had the chance to develop into the business enterprise it was planned to be. In the summer of 2005, the Tribe began reseeding parts of its waterways with oysters, and celebrated a renewal harvest of Shinnecock chunkoo oysters at the Tribal Thanksgiving Dinner, November 2006.

At the present moment, the Shinnecock annual Powwow is the economic development project of

record for the Shinnecock Nation. Revived in 1946 as a benefit for our church, the Powwow has evolved into an event that hosts thousands of visitors. But we are at the mercy of the weather. For the past two years, rainstorms have forced us to drastically revise our budgeting plans. We are now exploring Indian Gaming as a means of attaining the much needed self-sufficiency that will enable us to perform the sacred duties laid out for us by the Ancestors — to protect, manage and maintain the Shinnecock Indian Nation.

By Bevy Deer Jensen

Shinnecock Nation Communications Officer

ATTACHMENT 2

Entire Contents Copyright © 2004

TRIBE MARKS ONE YEAR SINCE SMOKE-SHOP RAID

"WHAT HAPPENED JULY 14 WAS HORRIBLE," SAYS NARRAGANSETT CHIEF SACHEM MATTHEW THOMAS. "I'M ANGRY THAT THE NARRAGANSETT NATION WAS DISRESPECTED."

08:38 AM EDT on Thursday, July 15, 2004
BY KATIE MULVANEY
Journal Staff Writer

CHARLESTOWN -- A year may have passed since the state police raid on the Narragansett Indians' smoke shop, but the pain remains, tribal leaders said yesterday.

"I don't think we'll be able to take that wound away. When your leader is taken to the ground, it cuts deep," Chief Sachem Matthew Thomas said in a ceremony marking the one-year anniversary of the raid. "When something like that happens, it means someone looks at you as less, and we're not less."

Medicine man Lloyd Wilcox yesterday lit a ceremonial fire at the smoke shop site to recall the moment of the raid: 1:20 p.m. Narragansett leaders sprinkled tobacco onto the flames and invited members involved in the skirmish to join them in sending a prayer to the Creator.

"They are the ones who stood on the frontline," said Councilman Hiawatha Brown, who was arrested in the incident. "It's very important to protect tribal sovereignty."

The Narragansett tribe opened the shop on Route 2, on July 12, 2003. Two days later, Governor Carcieri ordered the state police to stop what officials claimed was the illegal sale of tax-free cigarettes.

A violent clash erupted that left eight people injured and eight tribal members arrested, including Thomas. Images of the confrontation played nationwide, drawing sharp criticism from Native American and civil rights groups.

About 200 tribal members and supporters gathered yesterday afternoon in front of the Narragansett Indian Health Center, where more than 1,000 people rallied on behalf of the Narragansetts three days after the raid. The crowd -- which included a busload of West Warwick residents -- feasted on hot dogs,

iced tea, sodas and cookies as speakers took the stage and others participated in ceremonial dance and drumming.

"My mother taught me to tuck my kids in . . . and if anything happens, to call the police," Councilwoman Bella Noka told those gathered. On July 14, she said, "it was the police who knocked down my kids, my husband, my chief."

"That day, it weighs heavy in my heart," said Noka, who was arrested in the raid along with her husband and two children.

Tribal leaders called for unity against a common opponent -- states bearing down on tribes struggling to gain economic independence.

"This brings Indian nations together to understand we all have the same fight . . . It's not just Rhode Island," said Lance Gumbs, chairman of the Shinnecock tribe, one of at least seven Northeast tribes to be represented. "This aggressive attitude comes to the surface as Indian tribes try to make themselves self-sufficient. We call it the new genocide -- keep us economically insufficient and you'll be able to control us."

The Shinnecocks operate nine smoke shops on Long Island, but are battling New York State in court for the right to open a casino.

Narragansett medicine man Wilcox blasted the governor for what he viewed as his hypocritical stance on gambling and his opposition to the tribe's proposed West Warwick casino.

Early this month, Governor Carcieri vetoed legislation that would have put Harrah's casino proposal before voters in November. Harrah's has promised to give the tribe a share in the revenue.

"Guess what, guess who wants their hands on the purse strings," Wilcox said.

Lawmakers expect to return to the State House in the coming weeks to override the veto.

The tribe opened the smoke shop last year after Carcieri and the General Assembly failed to approve holding a referendum on the casino question. A day later, state and tribal representatives met to discuss the shop, but those talks broke down over the casino issue.

Tribal leaders refused to close the shop, and left the meeting assuming that the next day would be spent in court, Thomas said.

"What happened July 14 was horrible," the chief said. "I'm angry that the Narragansett nation was disrespected."

First Councilman Randy Noka yesterday disputed any suggestion that the tribe had opened the smoke shop as a ploy to gain public sympathy. The tribe needed the income, and tobacco sales represented the second-largest moneymaker for tribes behind casinos, he said.

"Never, ever did we foresee the state troopers coming in 30 strong," said Noka, who was among those arrested.

U.S. District Judge William E. Smith ruled in December that the tribe did not have the right to operate the tax-free smoke shop on its Charlestown lands. The tribe has challenged that decision in the 1st U.S. Circuit Court of Appeals, arguing that as a sovereign nation the tribe is outside the state's taxing authority. Arguments are set for September.

The state agreed to hold off on the prosecution of tribal members until that appeal has been resolved.

The governor's office issued a statement yesterday saying that although "we completely disagree on the merits of establishing a full-fledged casino in Rhode Island," it would continue to work to forge "a climate of mutual respect and collaboration" with the tribe.

ATTACHMENT 3

Everything for People Concerned About Smoking & Nonsmokers' Rights FIRST on the Internet for Smoking News and Documents

Action on Smoking and Health A National Legal-Action Antismoking Organization Entirely Supported by Tax-Deductible Contributions

NY - Indian Smoke Shops Doing Brisk Business - No Sales Tax [03/13-6]

Excerpts from **Cigarette business is booming _ legally _ at tax-free N.Y. Indian reservation**

By Robert Gearty, Daily News (NY) [03/11/00]

NEW YORK --There are other ways to save money on cigarettes than buying them illegally from a smuggler.

One of them is to drive out to the Shinnecock Indian Reservation in Southampton, where cigarettes cost about $3 a pack and $28.50 a carton. They're tax-free and legal.

Off the reservation, cigarettes on Long Island go for as much as $5 a pack and $41 a carton.

On his way to make a cigarette purchase, Joseph Sgroi, 46, said he didn't mind driving more than an hour from his home in Long Beach, to the reservation to buy three cartons.

"You can't beat the prices," he said.

As a result of last week's big jump in the state tax on cigarettes, more smokers like Sgroi are flocking to the reservation's three Montauk Highway smoke shops.

The Shinnecock Nation is one of nine tribes in New York state with Indian sovereignty. As such, state tax laws aren't enforceable on their land.

Of the three reservation smoke stores, the Smoke Shop _ a ramshackle building with a dirt parking lot and two walkup windows _ is the busiest.

All major cigarette brands are available. But with a limited amount of storage space, there is enough room for only 60 cartons of each brand.

That discourages big purchases, as does a sign at the window limiting the number of cartons one person can buy to 30.

Still, sales are brisk as regular customers and newcomers pull up in their cars. For those who can't make the trip, there's mail order.

Presented as a public service by Action on Smoking and Health (ASH), 2013 H Street, N.W., Wash., DC 20006, USA, (202) 659-4310. ASH is a 31-year-old national legal-action antismoking and nonsmokers' rights organization which is entirely supported by tax-deductible contributions. Please credit ASH, and include ASH's web address: http://ash.org

ATTACHMENT 4

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

ENTRY INTO FORCE: 4 January 1969, in accordance with article 19.1

REGISTRATION: 12 March 1969, No. 9464.

TEXT: United Nations, *Treaty Series* , vol. 660, p. 195.

STATUS: Signatories: 85. Parties: 173.

NOTE: The Convention was adopted by the General Assembly of the United Nations in resolution 2106 (XX)2 of 21 December 1965.

Declarations and Reservations

(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession. For objections thereto and declarations recognizing the competence of the Committee on the Elimination of Racial Discrimination, see hereinafter.)

AFGHANISTAN

Reservation:

While acceding to the International Convention on the Elimination of All Forms of Racial Discrimination, the Democratic Republic of Afghanistan does not consider itself bound by the provisions of article 22 of the Convention since according to this article, in the event of disagreement between two or several States Parties to the Convention on the interpretation and implementation of provisions of the Convention, the matters could be referred to the International Court of Justice upon the request of only one side.

The Democratic Republic of Afghanistan, therefore, states that should any disagreement emerge on the interpretation and implementation of the Convention, the matter will be referred to the International Court of Justice only if all concerned parties agree with that procedure.

Declaration:

Furthermore, the Democratic Republic of Afghanistan states that the provisions of articles 17 and 18 of the International Convention on the Elimination of All Forms of Racial Discrimination have a discriminatory nature against some states and therefore are not in conformity with the principle of universality of international treaties.

ANTIGUA AND BARBUDA

Declaration:

"The Constitution of Antigua and Barbuda entrenches and guarantees to every person in Antigua and Barbuda the fundamental rights and freedoms of the individual irrespective of race or place of origin. The Constitution prescribes judicial processes to be observed in the event of the violation of any of these rights, whether by the state or

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Upon signature:

Subject to the following reservation and interpretative statements:

"First, in the present circumstances deriving from the usurpation of power in Rhodesia by the illegal régime, the United Kingdom must sign subject to a reservation of the right not to apply the Convention to Rhodesia unless and until the United Kingdom informs the Secretary-General of the United Nations that it is in a position to ensure that the obligations

imposed by the Convention in respect of that territory can be fully implemented.

"Secondly, the United Kingdom wishes to state its under- standing of certain articles in the Convention. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4. Further, the United Kingdom interprets the requirement in article 6 concerning `reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available and interprets `satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end. In addition it interprets article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention.

"Lastly, the United Kingdom maintains its position in regard to article 15. In its view this article is discriminatory in that it establishes arocedure for the receipt of petitions relating to dependent territories while making no comparable provision for States without such territories. Moreover, the article

purports to establish a procedure applicable to the dependent territories of States whether or not those States have become parties to the Convention. Her Majesty's Government have decided that the United Kingdom should sign the Convention, these objections notwithstanding, because of the importance they attach to the Convention as a whole."

Upon ratification:

"First, the reservation and interpretative statements made by the United Kingdom at the time of signature of the Convention are maintained.

"Secondly, the United Kingdom does not regard the Commonwealth Immigrants Acts, 1962 and 1968, or their application, as involving any racial discrimination within the meaning of paragraph 1 of article 1, or any other provision of the Convention, and fully reserves its right to continue to apply those Acts.

"Lastly, to the extent if any, that any law relating to election in Fiji may not fulfil the obligations referred to in article 5 (c), that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5 (d) (v), or that the school system of Fiji may not fulfil the obligations referred to in articles 2, 3 or 5 (e) (v), the United Kingdom reserves the right not to apply the Convention to Fiji."

UNITED STATES OF AMERICA

Upon signature:

"The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America."

Upon ratification:

"I. The Senate's advice and consent is subject to the following reservations:

(1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association.

Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

(2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of nongovernmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under

the Convention by reference in article 1 to fields of 'public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except asmandated by the Constitution and laws of the United States. (3) That with reference to article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

II. The Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention:

That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention.

III. The Senate's advice and consent is subject to the following declaration:

That the United States declares that the provisions of the Convention are not self-executing."

VIETNAM

Declaration:

(1) The Government of the Socialist Republic of Viet Nam declares that the provisions of article 17 (1) and of article 18 (1) of the Convention whereby a number of States are deprived of the opportunity of becoming Parties to the said Convention are of a discriminatory nature and it considers that, in accordance with the principle of the sovereign equality of States, the Convention should be open to participation by all States without discrimination or restriction of any kind.

Reservation:

(2) The Government of the Socialist Republic of Viet Nam does not consider itself bound by the provisions of article 22 of the Convention and holds that, for any dispute with regard to the interpretation or application of the Convention to be brought before the International Court of Justice, the consent of all parties to the dispute is necessary. *(The reservation was circulated by the Secretary-General on 10 August 1982.)*

YEMEN

"The accession of the People's Democratic Republic of Yemen to this Convention shall in no way signify

recognition of Israel or entry into a relationship with it regarding any matter regulated by the said Convention. "The People's Democratic Republic of Yemen does not consider itself bound by the provisions of Article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision, and states that, in each individual case, the consent of all parties to such a dispute is necessary for referral of the dispute to the International Court of Justice.

"The People's Democratic Republic of Yemen states that the provisions of Article 17, paragraph 1, and Article 18, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination whereby a number of States are deprived of the opportunity to become Parties to the Convention is of a discriminatory nature, and holds that, in accordance with the principle of the sovereign equality of States, the Convention should be opened to participation by all interested States without discrimination or restriction of any kind."

Declarations recognizing the competence of the Committee on the Elimination of Racial Discrimination ***in accordance with article 14 of the Convention***

ALGERIA

12 September 1989

The Algerian Government declares, pursuant to article 14 of the Convention, that it recognizes the competence of the Commit tee to receive and consider communications from

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3 December 1982

In accordance with [article 14], the Government of Senegal declares that it recognizes the competence of the Committee (on the Elimination of Racial Discrimination) to receive and consider communications from individuals within its jurisdiction claiming to be victims of a violation by Senegal of any of the rights set forth in the convention on the Elimination of All Forms of Racial Discrimination.

SLOVAKIA

17 March 1995

The Slovak Republic, pursuant to article 14 of the Convention, recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation of any of the rights set forth in the Convention.

SPAIN

13 January 1998

[The Government of Spain] recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Spain claiming to be victims of violations by the Spanish State of any of the rights set forth in that Convention.

Such competence shall be accepted only after appeals to national jurisdiction bodies have been exhausted, and it must be exercised within three months following the date of the final judicial decision.

SWEDEN

"Sweden recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Sweden claiming to be victims of a violation by Sweden of any of the rights set forth in the Convention, with the reservation that the Committee shall not consider any communication from an individual or a group of individuals unless the Committee has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

UKRAINE

28 July 1992

In accordance with the article 14 of the International Convention on the Elimination of All forms of Racial Discrimination, Ukraine declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals [within its jurisdiction] claiming to be victims of a violation by [it] of any of the rights set forth in the Convention.

URUGUAY

11 September 1972

The Government of Uruguay recognizes the competence of the Committee on the Elimination of Racial Discrimination, under article 14 of the Convention.

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Office of the United Nations High Commissioner for Human Rights Geneva, Switzerland

The New York Times

Metro Matters; An End Run Around Tax On Cigarettes

By JOYCE PURNICK

Published: Monday, January 3, 2000

DOCTORS and scientists are thrilled with New York's new tax on cigarettes, and with good reason. Once the higher tax kicks in, cigarettes in New York will be more expensive than anywhere else in the country. The price will inevitably turn some smokers into nonsmokers and deter many young people from ever picking up one of those noxious weeds. But the medical community and lawmakers who approved the new tax aren't the only ones cheering.

So is Larry Ballagh, proprietor of a smoke shop on an Indian reservation in Irving, near Buffalo. Customers at his shop do not pay taxes, so the State Legislature has made him one happy fellow. "God bless them," said Mr. Ballagh, a member of the Seneca nation. "Every time they do it, more people come," he said, referring to the Legislature's decision to raise the tax. "I guess there is some indication that an increase in prices does encourage a certain number of people to quit, which may be a good thing. But New York State taxes make our product more attractive."

It would seem so. The folks at the Shinnecock Smoke Shop in Southampton recently bought a full-page ad in The New York Post illustrated with an Indian in feathered headdress. And the Web is crowded with

cigarette come-ons. Just one site -- webmaster@discount-cigarettes.org/ -- lists screen after screen of vendors, from BigIndian.com to SmokemCheap.com.

All, from the small mom-and-pop operation to the established business enterprise, undersell traditional stores by at least $10, selling top brands for $22.35 to $24.99 a carton (plus $1.50 for shipping).

One regular customer of an Indian smoke store in Shirley, Long Island, where several smoke shops dot suburban streets, stocks up every month. "It's a big saving," he said. "Why not?"

Non-Indians are supposed to pay state and local taxes in reservation shops, but they do not, and now the Internet brings the tax-free benefits of reservation shopping to smokers without cars.

With the tax soon almost doubling to $1.11 a pack, cigarettes will cost more in New York than anywhere else in the country: about $4 a pack and $42 a carton in New York City. The incentive to find bargains will be greater than ever -- as will the incentive to provide those bargains.

Hence a few troubling predictions along with the happy ones about declines in smoking: that the higher price will energize Internet, mail order and reservation sales, as well as the already healthy black market in cigarettes smuggled in from other states. People with conventional stores in Binghamton and other towns near Pennsylvania,

where the taxes are lower, worry about losing customers.

Nobody keeps reliable statistics, but estimates are that tax-free sales online and in reservation shops now account for a very small percentage of cigarette sales. The same for the black market. But there are signs of growth.

According to the Federal Bureau of Alcohol, Tobacco and Firearms, states with the highest cigarette taxes in 1998 were losing $100 million a year in potential tax revenues to smuggling. After Maryland raised its tax last year to 66 cents a pack from 36 cents, state authorities said that in three months, they made more arrests for cigarette smuggling (nine) than in the entire previous year (five). In previous years, when New York raised taxes much higher than neighboring states, truckloads of cigarettes were smuggled in from states with lower taxes.

THE new tax is to help to finance health care coverage for up to one million uninsured New Yorkers. If too many sales go untaxed, then what?

"Good things are going to happen for the uninsured, but we are concerned about uncollected taxes," said John McCardle, a spokesman for the Republican majority in the State Senate. "It's a mixed bag."

Joseph Conway, spokesman for Gov. George E. Pataki's budget division, said that the budget office considered uncollected taxes and potential declines in smoking in its calculations. He said details would

have to wait until the governor's budget presentation later this month.

Dr. K. Michael Cummings, with the State Department of Health's Roswell Park Cancer Institute in Buffalo, said what matters is that cigarette smoking will decline. "Yes, there are people who will buy on the Internet and on Indian reservations, but a big proportion? No. Will the tax have a deterrent effect on cigarette smoking? Yes."

Cigarette sales declined elsewhere when taxes went up. Nobody can say with certainty, though, whether those figures represented fewer smokers, or more enterprising shoppers.

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A suggested letter would read:

Dear (Representative),

I am writing you to urge you to vote against a bill currently pending in the House Of Representatives, HR 2824.

This bill, once again, singles out smokers like me and imposes what are clearly unconstitutional restrictions on my freedom as a consumer to purchase legal products in the same way I can purchase any other legal product.

For too long we smokers have allowed the government to impose clearly unfair legal burdens on us. I, for one, am tired of it, and intend to watch how you vote, so I can vote accordingly.

Sincerely,
(Your name here)

ACTION ALERT # 4

New York Indian Tribes Rally to Support Native Businesses

MASTIC, N.Y., June 15 /PRNewswire/ -- The Native American Business Alliance of Long Island today caravanned from the Unkechaug Powwow Grounds (Mastic, N.Y.) to the **Shinnecock** territory (Southampton, N.Y.) to support its new grassroots effort to protect Indian Nations' right to sell tax-free tobacco products.

"The faces you see here today are the faces of those who depend on Native American Businesses," Unkechaug tribal chief Harry Wallace said. "Without our treaty-mandated right to sell tax-free tobacco, these businesses -- these people -- will suffer. That is why we are here today -- to defend our rights and to defend our economic independence."

Members of Tuscarora, Seneca, Onondaga, Oneida, Cayuga, Mohawk, Pequot, Narragansett and other Nations, along with friends, neighbors and business colleagues of the Tribes, rallied against the politicians and wealthy special interest groups that have passed legislation and filed lawsuits that threaten to terminate centuries-old treaties protecting the right of New York Tribes to sell tax-free tobacco and other goods on their own territories. With over 5,000 supporters thus far, the Alliance is demanding that new legislation be enacted to rescind this unjust act. The Alliance is also urging

New York citizens to call upon the convenience stores and big chain supermarkets, asking them to drop their lawsuits against these small Indian smoke shops.

Following the rally, supporters toured a Shinnecock-owned small business, "Raindrop's Quick Stop" on Montauk Highway.

"The politicians in Albany need to visit native businesses like these so they can see that executing this legislation will cripple the economy of New York Tribes," said Rebecca Genia, of the Shinnecock Nation. "Taking away the rights laid out in these long-standing treaties would take away many people's livelihood."

Income from Indian smoke shops helps Tribes pay their own way, using some of the profits to fix schools, churches, playgrounds and housing on reservations. They also employ hundreds of tribal members with full healthcare and retirement benefits and generate economic activity for local, non-Indian businesses that supply their stores.

New Yorkers can join the Alliance by going to http://www.supportnativebusiness.com, where they can sign a petition, write directly to state officials, and get additional information.

The Native American Business Alliance of Long Island represents the Nations and the Indian-owned stores of the Unkechaug and Shinnecock Nations. We have formed this coalition because without help from our friends, neighbors and business colleagues,

these stores will be shut down -- ending a vital source of economic activity.

ACTION ALERT # 5

$2 FEDERAL CIGARETTE TAX HIKE SOUGHT

Though the article below [$2 Federal Cigarette Tax Hike Sought] includes the ray of sunshine that President Bush supports tax cuts, not tax hikes, it is still a good idea to let our leaders know that enough is enough.

State taxes on **cigarettes** are intended to be used to cover health care costs related to smoking and prevention. They're not. The settlement between the tobacco industry and the 46 states, at $246 billion, was intended to cover the same. It's not. So they want to raise the federal tax by $2 to cover what was already supposed to be covered?

Most abhorrent is the sanctimonious belief that they hold some right to force adults to stop using a legal product via financial persecution. If special interest groups and all around busybodies can get away with using this method to control one particular behavior deemed a "health risk" what is to stop the next group from trying to control other "risky" behavior using the same methods?

This article reports: "Anti-tobacco activists said the report is a powerful tool for pressuring the Bush administration and Congress."

Time to add our own pressure against such social engineering. **Write your U.S. Senators, House Representatives and President Bush.** Go to

Congress.org for all the contact information you'll need at your fingertips.

SIGN OUR PETITIONS

http://www.PetitionOnline.com/nofedtax/petition.html http://www.ipetitions.com/campaigns/no_fed_tax

SUPERPAGES.COM

Southampton, NY Attraction

Shinnecock Indian Outpost

Old Montauk Hwy
Southampton, NY 11968
(631) 283-8047
Interactive Map
Driving Directions

This funky shop sells tax-free **cigarettes**, American Indian crafts, clothes, and glassware. The prices are reasonable, and you can do your browsing and shopping quite early in the morning, should you wish to avoid too many crowds. There also is a deli, where you can get your morning coffee and bagel. The Outpost makes for a quick and easy stop before you begin your day of sightseeing. (Summer, Monday-Sunday 6:30 am-7 pm to 6 pm rest of year)

INDIAN COUNTRY TODAY

Tax ruling could affirm sovereignty

By Gale Courey Toensing / Indian Country Today

Story Published: Mar 9, 2007

Story Updated: Sep 10, 2008

NEW YORK - In a turnaround from previous promises - or threats - to collect state taxes on tribal cigarette sales, the New York state attorney general;s office is seeking a declaratory judgment verifying that tribal nations and the distributors who sell them cigarettes are exempt from paying tobacco excise taxes.

The ruling, if granted, could be a de facto affirmation of tribal sovereignty and immunity; but tribal leaders expressed wariness in their response to the legal action - perhaps understandably, since the state's motion is not necessarily

motivated by a pure intention to support Indian sovereignty and immunity, but appears to be a tactic driven by the desire to avoid further lawsuits from the big tobacco companies.

A positive ruling could put to rest years of struggles between the tribes and state for tax sovereignty, and reaffirm previous court decisions. The tribes have steadily upheld their position of tribal sovereignty and immunity concerning trade on their lands, while state officials on a pendulum swing have vacillated between the somewhat sympathetic - or laissez faire

- attitude of former Gov. George Pataki to the hot-and-cold running position of Gov. Eliot Spitzer, who ratcheted up the pressure on reservation cigarette sales before last year's November elections, but later moderated his stance.

Andrew Cuomo, the new state attorney general, filed the motion for a declaratory judgment Feb. 5 in state Supreme Court in New York City. The motion, written by Assistant Attorney General Louis Willenken, names three categories of defendants: Philip Morris and more than 50 other big tobacco companies that signed the $246 billion tobacco Master Settlement Agreement of 1998; more than two dozen tobacco companies and distributors, such as Smokin' Joe and the Native Wholesale Supply Co., which did not sign the MSA; and the Cayuga, Oneida, Onondaga, Seneca, St. Regis Mohawk, Tonawanda Band of Senecas, Tuscarora, **Shinnecock** and Unkechaug tribal nations.

As background, Philip Morris and the other signatories to the tobacco settlement, known as the PM defendants, or participating manufacturers, are required by the state's Public Health Law that implemented the MSA to pay millions of dollars each year to the state government.

Companies that sell **cigarettes** in New York but didn't sign the MSA are known as the NPM, or nonparticipating manufacturers. The companies are required to make annual escrow deposits of funds, based on the "units sold" - the number of individual **cigarettes** - in the state on which the state collects taxes in case a future court ruling requires these

companies have to make MSA-like payments to offset smoking-related illnesses.

The NPM companies are not required to pay taxes or set aide escrow funds on the **cigarettes** they sell to tribal nations.

The American Indian defendants are those with tribal lands in New York state, which "has a policy of recognizing the sovereignty of Native American Defendants that existed prior to the passage" of the state Public Health Law, the motion says. The state also has a "long history of taking the position that it is improper for the State of New York to place any burden [tax, escrow or otherwise] on the sale of **cigarettes** by Native Americans," the motion says.

But Philip Morris and the other big PM tobacco companies are now going after the state for not requiring the NPM companies to put money into escrow on the **cigarettes** they sell to the nations.

"PM defendants have advised New York that they take the position that New York does not properly enforce [the Public Health Law] because New York does not require escrow deposits on PM cigarette sales on Native American lands," the motion says.

The attorney general disagrees. If Philip Morris and the other big tobacco companies are correct, the motion says, it would increase both the cost and price of the **cigarettes** NPM defendants sell to the tribes and those sold on tribal lands.

"In addition, the correct interpretation of [the] Public Health Law impacts on the relationship between the

State of New York and Native American Tribes in New York," the motion says.

Both the attorney general's office and Philip Morris declined to comment on the pending legal action.

Chief Harry Wallace of the Unkechaug Indian Nation of Poospatuck Indians questioned the purpose of the legal action:

"So, the attorney general, if you can believe this, looks like he's on our side, right? Obviously, there is a level of suspicion and disbelief when any government officials, especially attorneys general, argue that Indian nations are sovereign and not subject to taxes. You have to wonder why."

The obvious explanation, Wallace said, is that the state wants to avoid the not-so-veiled threat by Philip Morris of another protracted and expensive lawsuit.

"Philip Morris is angling not to pay or to renegotiate their terms under the MSA. They're using allegations of noncompliance by these nonparticipating wholesalers and manufacturers as leverage to reduce their commitment. The new CEO is a bean-counter. That's the obvious answer. The not-so-obvious answer is why would he [the attorney general] be so specific in reference to Indian tribes? Why would he seek this declaratory action? What does he hope to gain from it apart from avoiding another lawsuit?"

Joseph Crangle, a former Seneca attorney who has handled several of the state's lawsuits against the

tribe, said the motion for declaratory judgment is "certainly recognition of the state's lack of civil regulatory jurisdiction over activities on the Seneca and other reservations."

"Maybe it's the power of the Holy Spirit and they're wising up and understand they're not going to be successful in legal actions," he quipped.

A positive ruling on the request for declaratory judgment would reiterate the tribal sovereignty and immunity that is already established state law, Crangle said, citing a 1999 case filed by an association of convenience stores against the state to try to force the state tax on Indian sales of cigarettes.

"In his decision, and I'm quoting him directly, the judge said: 'Tribes possess substantial attributes of sovereignty. Indian tribes have immunity from suit and cannot be sued to accomplish tax collections. This immunity extends to tribal retailers.' You can't get anything stronger than that," Crangle said.

The decision withstood appeals all the way up to the U.S. Supreme Court, which denied the convenience store group's petition.

"So that is the law of New York state," Crangle said, and the request for declaratory motion, if granted, will reaffirm it.

Other tribes declined to comment, citing the pending litigation.

From: teas@uspto.gov
To: smm@milopc.com
CC:
Subject: Received Your Trademark/Service Mark Application, Principal Register Form for serial number 78918500
Date: Wed, 28 Jun 2006 10:22:49 -0400 (EDT)

MARK: SHINNECOCK BRAND LIGHTS (stylized and or with design)

The lileral element of the mark consists of SHINNECOCK BRAND LIGHTS. The applicant claims color as a feature of the mark, namely, RED and GREEN and YELLOW and BROWN and BLUE. The mark consists of a YELLOW background with WHITE swirls. In the center is a BLACK circle broken by a pipe. The pipe is BROWN with a YELLOW bowl and feathers attached that are BLACK at the top, with RED under the BLACK on one side and BLUE under the BLACK on the other side and ending in WHITE tips. In the center of the circle are a Native American woman with BLACK hair, a BROWN face and a WHITE dress with PINK and BLUE highlights, and a Native American man with feathers in his hair, a BROWN face, and a YELLOW shin with fringe. RED, BLUE, WHITE and BLACK appear on the feathers in the man's hair and in decorations on the sleeve of his shirt. The woman is holding a BROWN flower and the man is holding a WHITE pipe. Between theman and woman is a rising PINK sun with a RED center and a YELLOW corona behind a WHITE flowering GREEN tobacco plant against BLACK mountains. The wording in the mark is BLACK...

We have received your application and assigned serial number 78918500' to your submission. The summary of the application data, *bottom below* serves as your official filing receipt. **In approximately 6-7 months, your application will be assigned to an examining attorney; however, the critical date for determining registrability is your *filing date*, NOT the actual *examination date*. You *will not* receive any further USPTO communications until examination.** At this point, your mark is not registered it is only a "pending" application. The overall process, from the time of initial filing to final registration, can take 13-18 months, and even longer depending on many factors, e.g., the correctness of the original filing, or the type of application filed.

If you discover an error in the application data, you may file a Preliminary Amendment, stating your proposed correction, at http://www.uspw.govteas/eTEASpageB2.htm. Do **not** submit any proposed amendment to TEAS@uspto.gov, because the technical team cannot make **any** changes to already filed data. **NOTE:** You cannot file a Preliminary Amendment until at least 15 days after the initial filing of the application. Prior to that time, the serial number will not appear in the USPTO database (even though the number was assigned at the time of filing), preventing the uploading of new data. If you submit a Preliminary Amendment, the acceptability of that amendment will not be determined until regular examination begins; i.e., the assigned examining attorney will decide at that time whether the change proposed in the amendment is permissible--not all errors may be

corrected. *E.g.,* if you submitted the wrong mark, if the proposed correction would be considered a material alteration to your original filing, this will not be accepted. Unfortunately, your only recourse in that event is to re-file.

Since you have already submitted your application, do **not** contact TEAS@uspto.gov to request cancellation. The USPTO will **not** cancel the filing or refund your fee, unless the application does not meet minimum filing requirements; i.e., if the USPTO later determines that no filing date was justified, we will return your submission, and refund the filing fee. You could then, if possible, cure the deficiency, and re-file the application. Otherwise, the fee is a processing fee, which we do **not** refund, even if we cannot issue a registration after our substantive review. The only way to "cancel" an application is to file an Express Abandonment. at http://www.uwto.gov//teas/eTEAS.pagcF.htm, waiting at least 15 days after the initial filing; however. you would not receive a fee refund under those circumstances.

NOTE: The only "exception" to the above is if you inadvertently file duplicate applications, due to a technical glitch; *i.e.,* if you believe that the first filing did not go through, and immediately file again, only to learn later that *both* filings were successful, then the support team at TEAS@uspto.gov can mis-assign and refund one of the filings. This must be due to a technical problem (which we will independently verify), and not a mere misunderstanding or mistake.

NOTE: To check status, please use hnp://larr.uspto.gov. Do not submit status requests to TEAS@uspto.gov, as that mailbox is only for technical assistance. We recommend that you check status at the 6-month point. and *every two months thereafter* to ensure that you know of any action that the Office may have issued. Failure to respond timely to an action will result in abandonment of your application. All incoming and outgoing correspondence can be viewed at http://poral.uspto.gov/extenal/ponal/tow. If your status check reveals an action has issued, but you did not receive it, please immediately check the on-line site to view the action; filing deadlines are **not** extended due to failures [to receive USPTO mailings.

APPLICATION DATA: Trademark/Service Mark Application, Principal Register TEAS Pins Application

The applicant, SHINNECOCK SMOKE SHOP, a sole proprietorship organized under the laws of New York, comprising of JONATHAN K. SMITH, an on-reservation member of the Shinnecock Indian Nation., residing at Shinnecock Indian Reservation, Montauk Highway, Southampton, New York, United States, 11969, requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5,1946 (15 U.S.C. Section 1051 et seq.), as amended.

International Class 034: Cigarettes

If the applicant is filing under Section 1(b), intent to use, the applicant declares that it has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051 (b), as amended.

If the applicant is filing under Section 1(a), actual use in commerce, the applicant declares that it is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended.

If the applicant is filing under Section 44(d), priority based on foreign application, the applicant declares that it has a bona fide intention to use the mark in commerce on or in connection with the identified goods and/or services, and asserts a claim of priority based on a specified foreign application(s). 15 U.S.C. Section 1126(d), as amended.

If the applicant is filing under Section 44(e), foreign registration, the applicant declares that it has a bona fide intention to use the mark in commerce on or in connection with the identified goods and/or services, and submits a copy of the supporting foreign registration(s), and translation thereof, if appropriate. 15 U. S.C. Section 1126(e), as amended.

No claim is made to the exclusive right t0 use "BRAND", "LIGHTS", "MADE UNDER SOVEREIGN AUTHORITY" apart from the mark as shown.

The applicant hereby appoints Scott Michael Moore, Esq. of MOORE INTERNATIONAL LAW OFFICES, P.C., 45 Rockefeller Plaza, Suite 2000, New York, New York, United States, 10111 to submit this application on behalf of the applicant.

The USPTO is authorized to communicate with the applicant or its representative at the following email address: smm@milopc.com.

A fee payment in the amount of $275 has been submitted with the application, representing payment for 1 class(es).

Declaration Signature

Signature: /Scott Michael Moore/ Date: *06/28/2006*
Signatory's Name: Scott Michael Moore, Esq.
Signatory's Position: Attorney at Law

TEAS XML SUBMISSION

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a YELLOW corona behind a WHITE flowering GREEN tobacco plant against BLACK mountains. The wording in the mark is BLACK.. </text>
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